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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 579 320 61

C. H. AIRHART, (OTHERWISE H. C. AIRHART,) PLAINTIFF IN ERROR,

vs.

ANNA REDDING DE MASSIEU, JULIA TERESA MASSIEU, ADELFINA MASSIEU, LUIS MASSIEU, AND ALEXANDER MASSIEU.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED DECEMBER 2, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 570.

C. H. AIRHART, (OTHERWISE H. C. AIRHART,) PLAINTIFF IN ERROR,

vs.

ANNA REDDING DE MASSIEU, JULIA TERESA MASSIEU, ADELFINA MASSIEU, LUIS MASSIEU, AND ALEXANDER MASSIEU.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Writ of error	a	1
Citation	c	2
Petition	1	2
Citation and return	5	4
Pleas of defendants, January 10, 1873	6	4
Continuances	12	7
Amended answer, June 1, 1874	12	7
Order setting aside continuance and leave to both parties to amend, June 8, 1874	17	9
Amended answer, January 8, 1875	18	9
Further amended answer, January 8, 1875	20	11
Amended petition, January 8, 1875	23	12
Leave to both parties to amend, January 18, 1875	23	12
Amended petition, January 18, 1875	24	12
Exceptions and amended answer, January 25, 1875	26	13
Leave to plaintiff to amend, February 6, 1875	31	15
Plaintiff's amended pleas, February 6, 1875	31	15
Leave to defendants to amend, February 8, 1875	31	15
Exceptions and amended answer, February 8, 1875	32	16
Amended petition, February 8, 1875	33	16
Exceptions and amended answers, February 8, 1875	34	17
Instructions asked by plaintiff, February 15, 1874	36	17
Instructions asked by defendants, February 15, 1875	45	21
Charge of the court	54	24
Final entries and judgment	64	27
Motion for new trial and order overruling	71	30
Deraignment of defendants' title	73	31
Defendants' bill of exceptions	134	54
Map	217	84
Application for writ of error	230	88
Bond	231	89
Writ of error	234	90
Citation	236	90
Clerk's certificate	239	91

a UNITED STATES OF AMERICA, *ss:*

The President of the United Statss to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu, who are plaintiffs, and C. H. Airhart, (otherwise H. C. Airhart,) who is defendant, No. 1283 on the docket of said circuit court of the United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said C. H. Airhart, (otherwise H. C. Airhart,) who is plaintiff in error herein, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court, the 5th day of March, in the year of our Lord one thousand eight hundred and seventy-five, and seal our said circuit court, at Austin, in the 99th year of the Independence of the United States.

[SEAL.] M. HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin.

Allowed by—
Allowed by—

T. H. DUVAL,
U. S. Judge.

(Indorsed:) In Supreme Court of the United States. C. H. Airhart, (otherwise H. C. Airhart,) plff. in error, vs. Anna Redding de Massieu and others, defts. in error. Writ of error to Supreme Court of the United States. Issued 5 day of March, A. D. 1875. M. Hopkins, clk.

b United States of America to Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu, or their attorneys of record, John Hancock, C. S. West, & W. F. North, partners under the firm style of Hancock, West & North, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein C. H. Airhart (otherwise

H. C. Airhart,) is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 5 day of March, in the year of our Lord one thousand eight hundred and seventy-five.

F. H. DUVAL,
U. S. Judge.

Test with seal of court, at Austin, this 5th day of March, A. D. 1875.
[SEAL.] M. HOPKINS, *Clk.*

c Came to hand March 12, 1875, and executed same day by delivering a certified copy to C. S. West, in Austin, Texas.

THOMAS F. PURNELL,
U. S. Marshal.
Per HOUSTON, *Dep.*

Service, $2.00.

(Indorsed:) In Supreme Court of the United States. C. H. (otherwise H. C.) Airhart, plff. in error, vs. Anna Redding de Massieu and others, defts. in error. Citation in error, issued 5 day of March, A. D. 1875. M. Hopkins, clk. U. S. circuit court, Austin.

1 Be it remembered that at a term of the circuit court of the United States, 5th circuit, in and for the western district of Texas, begun and held at Austin, for the January term, A. D. 1875, to wit, on the first Monday of January, 1875, being the fourth day of said month, among others, the following proceedings were had, to wit:

ANNA R. DE MASSIEU, JULIA TERESA MASSIEU, Adelfina Massieu, Louis Massieu, & Alexander Massieu, plaintiffs,
vs.
C. H. AIRHART, DEFENDANT. } No. 1283.

On the 3d day of June, A. D. 1872, the plaintiffs, by their attorneys,

Hancock & West, filed their petition herein, which is endorsed, to wit: "No. 1283. U. S. circuit court, western district of Texas. Petition. Anna R. DeMassieu, Julia T. Massieu, Adelfina Massieu, Lewis Massieu, et. al., plff., vs. C. H. Airhart. Petition. Filed June 3rd, 1872. M. Hopkins, clerk. Process issued June 13, 1872. Hancock & West, plffs.' attys:"

And in words, to wit:

THE UNITED STATES OF AMERICA,
State of Texas, Western District of Texas:

2 In United States circuit court, at Austin, Texas. To the honorable the circuit court of the United States for the western district of Texas.

The petition of Anna Redding de Massieu, Julia Teresa Massieu,

Adelfina Massieu, Luis Massieu, and Alexander Massieu, who will hereafter be styled the petitioners, shows unto the court:

That your said petitioners are citizens of the republic of Mexico, and reside in the city of Mexico, in said republic. Your said petitioners bring this their suit by permission of the court against one C. H. Airhart, who is a resident of the State of Texas, and who resides in Anderson County, in said State and western district. And your petitioners show that on the first day of July, A. D. 1869, your petitioners were lawfully seized and possessed in fee and were the legal owners of the following tract of land, lying and being in the State of Texas, and situated in said county of Anderson and in the county of Freestone in said State, and more particularly described by metes as follows: Being situated on the right and left banks of the Trinity River, bounded above by the eleven leagues which were surveyed for Don Manuel Rionda,
3 and below, on the western bank of the river, by some lands which were surveyed, by the order of the alcalde of Nacogdoches, for citizen Simon Sanchez, beginning at the N. E. corner of the upper league of said Sanchez, which is a white oak, 30 in. in dia., on the W. bank of said Trinity River, and bears N. 70° 40′ W. 6⅗ vs. from an ash, and is the first land-mark of this survey; thence, with said Sanchez' upper line, S. 45° W. 11,111 vs. to the N. W. corner of said Sanchez', which is a stake in an opening and is the second corner of this survey; thence S. 45° E. 2,500 vs. with the line of said Sanchez' league, until arrived at the S. W. corner of the same, which is a stake bearing S. 48° 30′ E. 19 vs. from a Chinese oak (encino China) 2 in. dia., and S. 31° E. 11 vs. from a hackberry 13 in. dia., and is the third corner of this survey; thence S. 45° W. 9,632½ vs. to a stake, which is the fourth corner of this survey and is bounded by vacant lands; thence N. 45° W. 7,500 vs. to another stake, which is the fifth corner of this survey and the first of the eleven leagues surveyed for Mr. Rionda; thence N. 45° E. 20,833⅓ vs. came to the river where a tree was marked, 4 in. dia., and bears N. 84° W. from an ash 6 in. dia., and to the S. 56° E. 60 vs. from an ash 5
4 in dia.; these were marked at 100 vs. from the river; crossing the river to the east side with 367.66⅔ vs. ar'ived at the S. E. corner of M'. Rionda', and with 40,000 vs. came to the stake which is the sixth corner of this survey and is bounded by vacant lands; thence S. 45° E. 7,500 vs. to another stake which is the seventh corner of this survey and is bounded by vacent lands; thence S. 45° W. 21,676⅔ vs. to a stake on the E. bank of the river. This is the eight' corner and the last one of this survey, and is bounded across the river by the S. E. corner of the upper league which was surveyed, by order of the alcalde of this town, for said Sanches; thence, following the meanders of the river, up the stream to completing in a straight line, N. W. 2,500 vs. came opposite the first corner, crossing the river to said corner on the west bank and the point of beginning.

Your petitioners further represent that being so seized and actually possessed of the above tract of land on the said first day of July, A D. 1869, the said C. H. Airhart, illegally, and with force and arms entered upon said tract of land, and ousted and ejected your petitioners from the same, trod down the grass, dug up the dirt, cut down and carried away the timber, and enjoyed the rents, profits, use, and occupa-
5 tion of the same from the said last-named date hitherto with a strong hand down to the present date and day of trial, and now still continues to unlawfully, and with force and arms, withhold the possession of said land from your petitioners who are now the owners of it, to the damage of your petitioners in the sum of forty thousand dol-

lars, and your petitioners say the land is of the value of one hundred thousand dollars.

Premises considered, your petitioners pray for citation to Anderson County, for the said C. H. Airhart, and on the trial for a judgment for their damages, costs, and a writ of possession.

HANCOCK & WEST,
Plff's. Attys.

Mr. C. H. Airhart will take notice that this action is brought as well to try title as for damages.

HANCOCK & WEST,
Plffs.' Attys.

Of citation & return.

On the 13th day of June, 1872, citation issued in due form of law, which is endorsed "No. 1283. Anna R. de Massieu et al. vs. C. H. Airhart. County of Anderson. Issued 13th day of June, 1872. M. Hopkins, clk."

The marshal's return of service is endorsed on the writ in words, to wit:

6 *Return of service.*

Received in office 30' day of June, 1872. Executed on the 16' day of July, 1872, by handing to the within-named defendant in person a true copy of this writ, and a copy of the petition attached, both certified to by the clerk of the court, under the seal of the court.

THOS. F. PURNELL,
U. S. M.,
By R. B. PETTY,
Deputy U. S. M.

And afterwards, to wit, January 10th, 1873, the pleas of defendant filed, endorsed, to wit: "No. 1283, Anna R. de Massieu et als. vs. C. H. Airhart. In U. S. circuit court, Austin. Exception, answer, pleas, and suggestion of improvements in good faith. Filed January 10, 1873. M. Hopkins, clk. Moore & Shelly, Reagan, Word & Jackson, attys. for defts."

And are in words, to wit:

Pleas of deft.

UNITED STATES OF AMERICA,
Western District of the State of Texas:

Circuit court at Austin. January term, 1873.

ANNA REDDING DE MASSIEU, JULIA TERESA Massieu, Adelfina Massieu, & Alexander Massieu, plffs.,
vs.
C. H. AIRHART, dft.

And now comes the said defendant, by attorney, and says that the petition of the said plaintiffs, and the matters and things therein con-

tained, in manner and form as the same are therein stated and
7 charged, are not sufficient in law to require of him any answer, and he excepts and demurs to the same for insufficiency, and prays the judgment of the court, &c.

MOORE & SHELLY,
REAGAN, WORD & JACKSON,
Attys. for Deft.

And for answer, the said defendant says he is not guilty of the said several wrongs, injuries, and trespasses laid to his charge, or any or either of them, or any part thereof, and of this he puts himself upon the country, &c.

MOORE & SHELLY,
REAGAN, WORD & JACKSON,
Attos. for Deft.

And, further answering, the said defendant says that he and those under whom he claims by regular title from and under the sovereignty of the soil for more than three years next preceding the commencement of this suit, deducting therefrom the time the statute of limitations was suspended by law were and are and have been in peaceable, adverse, and uninterrupted possession of the following-described lands, being part of lands sued for in this action, using, claiming, and enjoying the same for more than the three years aforesaid, adverse to the said plaintiffs and all others, to wit:

A tract of land containing eighteen hundred and forty-five acres, described as follows: "All that certain tract or parcel of land situate in
8 the county of Anderson, in the State aforesaid, (Texas,) and bounded as follows, to wit: Being the south part of E. C. Harris' survey, lying upon Cedar Lake. Beginning at the southeast corner of the said Harris' league survey; thence north at 669 varas passed the north boundary line of Ylrys' third of a league; at 2,621 varas set stake, from which post-oak 15 in. diameter, marked 'X' bears N. 11° W., 5 varas, another post-oak 10 in. diameter, marked 'X,' bears S. 7° E., 4 varas; thence west 5,384 varas to the west boundary line of said Harris' survey; thence east with the boundary of said survey 1,020 varas to another of said survey; thence south 1,005 varas to Ceda' Lake; thence with the meanders of said lake to the south boundary line of said survey; thence east with the said south boundary 2,776 varas to place of beginning." And also the following-described tract or parcel of land, being part of the said lands sued for in this suit, to wit: "All that tract of land situated in the county of Anderson, and State of Texas, known as R. S. Patton's head-right, bounded as follows: beginning where the Harris' league line crosses the old Patton line, at Fulton's corner, running east $498\frac{96}{100}$ varas to the S. W. corner of C. L. Kimbrough's lower survey in
9 the old Patton line; thence north $1{,}900\frac{80}{100}$ varas to a black-jack tree, marked 'R. P.,' in the old Patton line; thence west $498\frac{96}{100}$ varas to where the Harris' league line crosses the north boundary of the old Patton survey; thence south $1{,}900\frac{80}{100}$ to the place of beginning," and this he is ready to verify. And defts. disclaim' any right, title, or possession of and to any other portion of the land claimed by the said plffs. in their said action. Wherefore he prays judgment if the said plaintiffs ou't to have their suit, &c.

An' for further plea answer in this behalf, the said defendant says the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says that he and those under and through whom he

claims have had peaceable, uninterrupted, and adverse possession of the two above-described tracts of land, claiming, cultivating, using, and enjoying the same as their and his own, and paying all taxes due thereon under a deed and deeds duly registered, for more than five years next before the commencement of this suit, deducting the time therefrom during which the statute of limitations was suspended by law, and this he is ready to verify. Wherefore he prays judgment, &c.

And for further plea answer in this behalf, the said defendant says actio non, because he says that he and those under whom he
10 claims had and have had peaceable, uninterrupted, and adverse possession of the two tracts of land above described, claiming, using, cultivating, and enjoying the same adverse to all others, with lines and boundaries well marked and defined as above, for more than ten years next before the commencement of this suit, deducting therefrom the time during which the statute of limitations was suspended by law, and this he is ready to verify, wherefore he prays judgment, &c And the said defendant, further answering and pleading, says actio non; because he says that if the said plaintiffs ever had any rights to the said real estate, lands, tenements, and heriditaments in plaintiffs' petition mentioned, or right to enter or right of entry into and upon the same, being that portion claimed by said defendant, the said plaintiffs have wholly failed to make entry therein and thereon within the ten years next before the commencement of this suit, or within ten years next after their right, if any they ever had, accrued, and this the said defendant is ready to verify. Wherefore he says the said plaintiffs are forever barred by reason of non entry, and of this he prays judgment, &c.

MORE & SHELLY,
REAGAN, WORD & JACKSON,
Attys. for Deft.

11 And in addition to the foregoing pleas and answers the said defendant comes and suggests to the court, now here, that he and those under whom he claims entered in and upon the lands and tenements sued for in this action, in good faith, under a title eminating from the sover'ignty of the soil about the year 1850, when the said lands were wild and unimproved; that he and those under whom he claims, and for whose improvements he paid, have had adverse possession of the two tracts of land, in good faith, since the said year 1850; and that he and those under whom he claims have made permanent and valu'ble improvements on the lands sued for during the time he and they have had possession of the same, by clearing, fencing, and improving said lands, and building substantial & permanent buildings, dwelling-house, out-houses, stables, lots, wells, gin houses, and cribs, as shown by the bill of particulars hereto attached, and he prays compensation for the same.

Bill of particulars, viz:

Clearing & fencing & putting in cultivation 210 acres of land, @ $15 per acre..... $3,150 00
Dwelling-house, kitchen, out-houses, smoke-house, cotton-gin, screw & press, stables & lots..... $3,000 00

C. H. AIRHARD, *Deft.*
By MOORE, SHELLY,
REAGAN, WORD, & JACKSON,
Attys. for Deft.

12 *Continuances.*

And afterwards the following entry appears on the minutes of the court, to wit:

ANNA R. DE MASSIEU & OTHERS
vs.
C. H. AIRHART. } 1283.

On motion continued by consent.

And afterwards, June 3, 1873, continued by agreement.

And afterwards, Janu'y 7, 1874, continued by agreement on file.

And afterwards, June 2, 1874, continued.

And afterwards, to wit, June 1, 1874, amended answer, endorsed: "No. 1283. In U. S. circuit court at Austin. Anna Redding de Massieu & others vs. H. C. Airhart. Amended answer. Filed June 1, 1874. M. Hopkins, clk."
In words, to wit:

Amended answer.

In United States circuit court, at Austin, June term, 1874.

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas.

ANNA REDDING DE MASSIEU & OTHERS, PLFFS.,
vs.
C. H. AIRHART, DEFT. }

And now comes Henry C. Airhart, who is sued herein as C. H. Airhart, and amends his answers herein filed, leave of the court first being had & obtained, & for amendment charges & avers that his true Christian name is Henry C. Airhart, and not C. H. Airhart, as above styled,
13 and further charges & avers that one of the muniments or deeds filed by him herein & by which he claims title to the land described in his answer, to wit, the deed from Thos. G. Kimbrough to E. M. Dunn & C. H. Airhart, bearing date 30th day of Nov'r, A. D. 1868, was designed and intended to be a conveyance to this defendant, Henry C. Airhart & E. M. Dunn, but was by mistake written in the deed of conveyance as aforesaid C. H. Airhart, all of which he is ready to verify.

REGAN & GREENWOOD,
JACKSON & WORD,
Attys. for Deft.

And the said defendant, further amending and answering in this behalf, charges & avers that Edward C. Harris, through whom this deft. deraigns his title to the land described in his answer, having no notice of the claim of plaintiffs, or of the pretended grant under which they claim, heretofore, to wit, on the 26th day of June, A. D. 1835, purchased one league of land from the government of Coahuila & Texas, (a part of which is described in deft.'s answer,) & paid therefor a valuable consideration. That heretofore, to wit, on the 9th day of June, A. D. 1840,

Lester Hotchkiss, through whom deft. deraigns his title to the land described in his answer, having no notice of the pretended grant under which plaintiffs claim title or of the claim of plaintiffs, purchased of Edward C. Harris his said league of land, (a part of which is described in deft.'s
14 answer,) & paid therefor a valu'ble consideration; that heretofore, to wit, on the 9th day of June, A. D. 1840, Lestor Hotchkiss, through whom deft. deraigns his title to the land described in his answer, having no notice of the pretended grant under which plaintiffs claim title, or of the claim of plaintiffs, purchased of Edward C. Harris his said league of land, (a part of which is described in deft.'s answer,) & paid to him (the said Harris) therefor the sum of four thousand dollars.

Deft. further charges that heretofore, to wit, on the 24th day of April, A. D. 1844, Daniel H. Vail, through whom deft. deraigns title, purchased of Lestor Hotchkiss the said Edward C. Harris' league of , (a part of which is described in deft.'s answer,) & paid to him therefor four thousand dollars, & had no notice of the pretended grant under which plaintiffs claim, or of the claim of plaintiffs.

Defendant, further amending, charges & avers that heretofore, to wit, on the 1st day of June, A. D. 1855, Rufus M. Mynett & Elizabeth H. Mynett, through whom deft. deraigns his title, having no notice of the pretended grant of plaintiffs, or of the claim of plaintiffs, purchased said Edward C. Harris' league of land (a part of which is described in deft.'s answer) from Daniel H. Vail & Isabella Vail, and paid to them therefor three thousand dollars.

15 Deft., further amending, charges and avers that heretofore, to wit, on the 30th day of October, A. D. 1856, Thos. G. Kimbrough, having no notice of the pretended claim of plaintiffs, or of the pretended grant under which they claim, purchased of R. M. Mynett & his wife, Elizabeth H. Mynett, that tract of land described in deft.'s answer as being part of the Edward C. Harris' league of land, & paid to them therefor twenty-three hundred and six $\frac{25}{100}$ dollars.

Deft., further amending, charges & avers that heretofore, to wit, on the 30th day of Nov'r, A. D. 1868, E. M. Dunn and this deft., having no notice of the pretended grant under which plaintiff claims, or of the claim of plaintiffs, purchased the said land mentioned in deft.'s answer as being part of the Edward C. Harris league, and also, at same , purchased part of the R. S. Patton head-right, described in deft.'s answer, & paid for the same the sum of nineteen hundred & forty five $\frac{75}{100}$ dollars.

Deft., further answering, charges & avers that heretofore, to wit, on the 3rd day of November, A. D. 1869, this defendant, having no notice of the pretended grant under which plaintiffs claim, or of the claim of plaintiffs, purchased of Elbert M. Dunn & Ann E. Dunn their joint interest in the land and premises described in his answer, & paid therefor the sum of eight hundred dollars in gold.

16 Wherefore this defendant charges & avers that he & his vendors, & those from whom he derives title, are each innocent purchasers of the lands mentioned in his said answer, without notice, for a valu'ble consideration, whereby whatever claim the plaintiffs may have had is postponed, & his is the superior legal title to said land & premises. Wherefore he prays the judgment of the court if the said plaintiffs ought to have & maintain their aforesaid action thereof against him.

REAGAN & GREENWOOD,
Attys. for Deft.

And the said defendant, further amending in this behalf, says & charges that if said plaintiffs ever had any title to so much of the land and premises described in their petition (which deft. denies) as is claimed by this deft. in his answer, they are now forever estopped from claiming the land described in this deft.'s answer, because he says and charges that said plaintiffs, and those from whom they pretend to deraign their pretended titles, have failed and refused to authenticate legally their pretended testimonio, & to have them duly registered in Anderson County, or to give to deft. any notice of their claim to said lands at any time at or prior to this defendant's purchase, or that of those from whom he derives title, or prior to or at the date of the set-
17 tlement & improvements made on the lands mentioned in deft.'s answer, & that said plaintiffs, and those from whom they pretend to derive title, have fraudulently concealed their titles, if they ever had any, (and this defendant denies that they ever had,) & carried the same upon or about their persons, & have stood by and witnessed this defendant, and those through whom he derives title, purchase said lands, &c., open farms thereon, grow orchards, erect dwelling & out houses, gin-houses, corn-cribs, & stables, & said nothing of their purchased claim, whereby this defendant charges that said plaintiffs' pretended title is postponed to deft.'s superior legal title, and they are estopped from now claiming said land.

REAGAN & GREENWOOD,
Attys for Deft.

And the said defendant, further amending, in this behalf says & charges that said plaintiffs at no time since or prior to the bringing of this suit has paid the taxes due the State of Texas and to the county of Anderson on the said lands described in plaintiffs' petition, and that deft. has, prior to & since the bringing of this suit, regularly paid the taxes due the State & county of Anderson on the lands described in deft.'s answer. Wherefore he prays the judgment of the court if said plaintiffs ought to have and maintain their aforesaid action thereof against him.

REAGAN & GREENWOOD,
Attys. for Deft.

And afterwards, June 8, 1874, the following entry appears:
June 8, 1874.—Continuance set aside, leave to both parties to amend, & cont'd.

18 And afterwards, to wit, Jan'y 8, 1875, the following amended answer was filed, endorsed: "Amended answer. Filed January 8th, 1875. M. Hopkins, clk."
In words, to wit:

Amended answer.

In U. S. circuit court, at Austin, Texas, January term, A. D. 1875.

MASSIEU ET AL. *vs.* H. C. AIRHART. } No. 1283.

Now comes the defendant, by his attorneys, and, having obtained leave of the court therefor, amends his answers herein; and, amending,

charges and avers that the plaintiffs herein claim a pretended title by inheritance from one Anna Matilde de Massieu, and as her heirs at law, to the land sued for.

And defendant further avers that the said Anna Matilde de Massieu was born, lived, and died a native-born citizen of the republic of Mexico, and was an alien to the Government of the United States of America and to the State of Texas at the time of her death; and that plaintiffs in this suit are native citizens of the said republic of Mexico, and are aliens to the Government of the United States of America and to the State of Texas; and were such citizens of the republic of Mexico, and aliens to the Government of the United States of America and to the State of Texas, at the time at which they pretend that their said title to the land in controversy accrued to them; and that said plaintiffs have at no time been citizens of the United States of America or
19 of the State of Texas; wherefore this defendant alleges and charges that by reason of the alienage of the said Anna Matilde de Messieu and of the said plaintiffs to this suit, said plaintiffs ought not to have and maintain their aforesaid action against him; and of this he prays the judgment of the court, and for judgment as in his original and amended answers.

WORD & JACKSON,
REAGAN & GREENWOOD,
Atty. for Dft.

Further amending in this behalf, defendant charges and avers that the tract of land first mentioned in his original answer is a part of the head-right league of land granted to Edward C. Harris by the government of Coahuila and Texas, situated in Anderson County, Texas; and that the second tract of land described in said original answer is a part of the head-right survey of Robert S. Patton, situated in said Anderson County, Texas.

And, further amending, the said defendant suggests to the court that he and those whose estate he has in the lands and tenements mentioned in this and his original & amended answers, and sued for in this suit, have had adverse possession of the same in good faith for more than one year next before the commencement of this suit; and that he and those persons whose estate he has have made permanent and valuable improvements on the lands sued for during the time he and they have had such possession of the same, to wit, clearing, opening,
20 and fencing 210 acres of land, at $10 per acre, $2,100.00; building dwelling house, out-houses, kitchen, stables, well, gin-house, gin-stand, screw, and press, $1,500.00; and he prays that he may be permitted to introduce proof of the value of the same, and that he may recover the value of such permanent and valuable improvements.

REAGAN, GREENWOOD & GOOCH.
WORD, JACKSON & SHELLY & MOORE,
For Deft.

And afterwards the further amended answer was filed by defendant, endorsed: "Filed January 8th, 1875. M. Hopkins, clerk."

In words to wit:

Further amended answer.

In U. S. circuit court, western district of Texas, at Austin.

UNITED STATES OF AMERICA,
Western District of Texas:

ANNA R. DE MASSIEU & OTHERS, PLFFS.,
vs.
H. C. AIRHEART, DEFT. } No. 1283.

Now comes the said deft., by attorneys, and amends his answers herein filed, leave of the court first being had & obtained, and for amendment & plea in bar of the plaintiffs' charges, and avers that plffs. pretend to claim title to the land sued for as pretended heirs at law to Anna Matilda Massieu, and that said Anna Matilda Massieu was a citizen of the republic of Mexico from the date of her birth to the date of her
21 death or demise, and was born an alien and died an alien, and died an alien to the Government of the United States, and also an alien to the State & republic of Texas, and that the plaintiffs in this suit are native citizens of the republic of Mexico and remained such citizens up to the date of the death of Anna Matilda Massieu, and are now citizens of the republic of Mexico and aliens to the Government of the United States, and that said plffs. at the time have ever been citizens of the republic or State of Texas or of the United States. Wherefore these defendants say and charge that by reason of the alienage of said Anna Matilda Massieu, and of the said plaintiffs to this suit, the said plaintiffs ought not to have and maintain their aforesaid action thereof against this deft., & of this prays the judgment of the court & for judgment as in original & amended answers.

Defendant, further amending in this behalf, charges and avers that the tract of land first described by metes & bounds, and 1st mentioned in his original answer, is a part of the head-right league granted to Edward C. Harris by the government of Coahuila & Texas, situated in Anderson Co., Texas, and that the 2nd tract of land described in
22 said original answer is a part of the head-right survey of Robert S. Patton, situated in Anderson County, Texas.

An', *for* furthe' amending, the said defendant suggests to the court that he and those whose estate he has in the lands and tenements mentioned in this and his original and amended answers, and sued for in this suit, have had adverse possession of the same in good faith for more than one year next before the commencement of this suit; and that he and those persons whose estate he has have made permanent and valu'ble improvements on the lands sued for, during the time he and they have had such possession of the same, to wit: Clearing, opening, and fencing 210 acres of land, at $10 per acre, $2,100.00; building dwelling-house, out-houses & kitchen, stables, wells, gin-house, gin and stand-screw and press, $1,500.00; and he prays that he may be permitted introduce proof of the value of the same, and that he may recover the value of such permanent and valu'ble improvements.

REAGAN, GREENWOOD & GOOCH,
WORD, JACKSON, SHELLY & MOORE,
Attys. for Deft.

23 And afterwards, to wit, the following amended petition was filed, endorsed, to wit: "1283. Massieu et al. vs. Airhart. Amended petition. Filed Jany. 8, 1875."

And is in words, to wit:

Amended petition.

January term, 1875. In U. S. circuit court.

MASSIEU ET AL. *vs.* AIRHART. } No. 1283.

And now at this day come the plaintiffs and, with leave of the court first had and obtained, *and* amend their pleadings and say that they except to so much of the deft.'s amended answer as seeks to set up the defence of alienage and seeks to set up the defence of a want of right or power in the plffs. to hold by inheritance or claim as heir through and from an alien ancestor.

They further except to the said pleas as vague and indefinite and as presenting no issuable matter; and of this they ask judgment. And for they deny all and singular the matters stated in said amended and original answers.

HANCOCK, WEST & NORTH.
Plffs.' Attys.

And afterwards, to wit, January 18th, the following order was entered on the judges' docket:

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHART. } 1283.

Leave to defendant to amend, and also to plaintiff.

Whereupon the plaintiffs filed the following amended petition, endorsed: "Filed January 18, 1875. M. Hopkins, clk."

24 And which is in words, to wit:

Amended petition.

U. S. cir. ct. west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHART. } No. 1283.

And now come the plaintiffs in the above-entitled cause, and, leave of the court being first had and obtained, *and* by way of exception and amendment to their original petition filed in this court against the said C. H. Airhart, at the time of said filing, as well as now, a citizen of said State of Texas and residing in said western district thereof, they say:

1. That they except to so much of said defendant's plea and answers as set up the three years' statute of limitations, because the same, as plead, is not sufficient, and fail to set up facts sufficient to constitute a good defence.

2. They further except to so much of said answer and amended answers as seek to suggest improvements made in good faith upon the land in suit, because the same is insufficiently stated, and set up matters which cannot be considered in this court in the determination of this cause.

3. They further except to so much of said answers as set up the

alienage of said plaintiffs, because the same are insufficient and constitute no defence.

4. They further except to so much of said answers as set up the plea of innocent purchasers without notice, because the same is not
25 properly pleaded and sets up no legal defence, and even if it were well pleaded, the same is an equitable and not a legal defence.

And of all these matters plaintiffs pray the judgment of the court.

HANCOCK, WEST & NORTH,
Attys. for Plffs.

5. And by way of amendment and reply to the said plea of limitation filed in said suit, they say that said plffs. are citizens of the republic of Mexico, and were such at the time of the filing of said suit, and that said defendant was then, and now is, a citizen of the State of Texas, and that from on or about the 7th day of September, A. D. 1851, being the time when the title of said plaintiffs to the premises described in their petition accrued to them, down to the filing of said petition, the said plaintiffs were infants under the age of twenty years, and now plead infancy from said last-mentioned date to the bringing of said suit in reply to said defendant's pleas of limitation.

6. And for further reply said plaintiffs say that from the 28th day of January, 1861, until the 30th day of March, 1870, all statutes of limitation were suspended in the State of Texas by the war raging during said period between the United States and the Confederate States, and also by the constitution and laws of the State of Texas.

Plaintiffs further say that they deny that the possession of the said defendant has been notorious or peaceable; and they say on the contrary that the running of the statute of limitations was suspended
26 by reason of the said defendant and others entering into unlawful *continuous* for preventing possession being taken by or on behalf of said plaintiffs of said land in suit, and that by violence, force, and intimidation and not peaceably said defendant has had possession, if any possession he has had.

HANCOCK, WEST & NORTH.
Attys. for Plffs.

And afterwards, to wit, on January 25th, 1875, the following exception amended answer was filed, endorsed in words, to wit: "No. 1283. In U. S. circuit court western district of Texas. Anna Redding de Massieu et al. vs. C. H. Airheart. Exceptions amended answer. Filed Jany. 25, '75. M. Hopkins, clrk.

In words to wit:

Exception & amended answer.

In U. S. cir. court at Austin, January, 1875.

ANNA R. D. MASSIEU ET AL.
vs.
C. H. AIRHEART. } No. 1283.

1. Now comes the said defendant, by his attys., and excepts to the legal sufficiency of the plea of infancy, filed herein by the plaintiffs on the 18th day of January, A. D. 1875, because the same as plead is not sufficient and fails to set forth sufficient facts to make the same a good plea; & of this prays the judgment of the court.

WORD & JACKSON,
REAGAN & GREENWOOD,
Attys. for Deft.

27 2. And now comes the said defendant, by his attorneys, & amends his answers herein filed, leave of the court first being had, and charges & avers that the pretended protocol of the pretended grant of eleven leagues of land to Juan Ygnacia Aguilera, under which plaintiff' claims title, was never at any time prior to the 14th day of July, A. D. 1873, deposited in or filed in among the Mexican archives in the general land-office of Texas. Nor was the said protocol placed on deposit or filed in any other part of said general land-office. And this defendant further charges that the Edward C. Harris survey for one league of land was made in the year 1835, and title issued by the government of Coahuila & Texas to Edward C. Harris on 26th June, 1835, a part of which said tract of land is described in deft.'s answer heretofore filed herein, and owned by the deft. And this defendant, further amending, says & charges that said Edward C. Harris acquired his said title from the said government of Coahuila & Texas under the colonization laws of said government as an emigrant and settler in Burnett's colony, and had no knowledge of said eleven-league grant. And this defendant, further amending his said answer, says that in his former answers, wherein he charges that said Edward C. Harris was a
28 purchaser of said league of land, he did not mean to say that he was a purchaser as known to the colonization laws of Coahuila & Texas, but used said word according to its common-law meaning.

And this deft., further amending, charges and avers that the land described in his answers heretofore filed herein, and the said tract described in his said answers as being a part of the Robt. S. Patton survey, was first located and surveyed July 30th, 1854, and was located & surveyed by virtue of a genuine law certificate; and said Patton survey, as then made, was patented by the State of Texas 25th Novr., 1854, and subsequently being found in conflict with the Edward C. Harris grant & survey, the said *motion* or motion of Robt. S. Patton, & on his affidavit, the said patent was canceled by the Comm'r of the Gen'l Land-Office, and said land was resurveyed by virtue of said first location Novr. 14th, 1856, and patented by the State of Texas on the fourth day of Feby., A. D. 1857; and this defendant charges that at date of location & surveys of said tracts of land claimed by deft. the said plffs. had failed to have the testimonio of said Juan Ygnacia Aguilera grant duly recorded in the county clerk's office of the county in which said land was situated.

This defendant further avers that at no time prior to said sur-
29 vey for Edward C. Harris, and at no time prior to sale of said land by Edward C. Harris to Lestor Hotchkiss, & at no time prior to sale of said land by Lestor Hotchkiss to Daniel H. Vail, & at no time *no time* prior to sale of said land by Daniel H. Vail and Isabella Vail to R. M. & E. H. Mynatt, & at no time prior to sale by R. M. Mynott to Thos. G. Kimbrough, & at no time prior to sale by Thos. G. Kimbrough to E. M. Dunn & C. H. Airheart, (meaning deft.,) & at no time prior to sale by E. M. Dunn & Ann C. Dunn to H. C. Airheart, (this deft.,) and at no time prior to sale by R. S. Patton to Thos. G. Kimbrough, did the said plaintiffs have duly recorded in the county clerk's office of the county in which said land was situated the testimonio of the grant to Juan Ygnacia Aguilera; and the deft. charges that he and those under whom he claims had no actual notice of the existence of said Juan Ygnacia Aguilera grant. Wherefore this defendant says that if said plffs. ever had any title, the same has long since been postponed to the superior legal title of this deft.; and this he is ready to verify.

This defendant, further amending in this behalf & for plea in bar

and by way of answer to plffs. plea of infancy, says & charges that plaintiffs pretend to own the land in issue in this suit as the heirs
30 at law to Anna Matilda Massieu, dec'd, and that Anna Matilda Massieu, at the date of her death, was only seventeen years of age, & was an infant. And this deft. charges & avers that the statute of limitations commenced to run against the estate of said Anna Matilda Massieu after being suspended by law for one year after her death, and that the said law of limitations has not been suspended since except during the period from the 28th Jany., 1861, till 30th day of March, 1870, and that plffs. cannot tack the infancy of Anna Matilda Massieu to their alleged infancy to suspend the running of the law of limitations. And this deft. charges & avers that Anna Redding de Massieu has at no time been an infant for the past forty years; and this defendant denies that either of the plaintiffs were infants, as charged in plaintiffs' amended petition, and prays that they may be held to strict proof.

And this deft., further amending and plea in bar of plaintiffs' action, says that he and those from whom he claims to have derived the lawful title to the lands and tenements described in his answers heretofore filed herein have had the quiet, peaceable, and continuous possession, use, and enjoyment of said lands & tenements, holding the same ad-
31 versely to all the world, under color of title, for more than three years next before the institution of this suit; and of this prays the judgment of the court.

WORD & JACKSON,
MOORE & SHELLY,
REAGAN & GREENWOOD,
Atty. for Deft.

And afterwards, on the 6th day of February, 1875, the following order appears upon the minutes of the court:

On motion, plaintiffs have leave to amend.

Amended petition endorsed: "Filed Febry. 6th, 1875. M. Hopkins. clerk."

And is in words, to wit:

Plaintiffs' amended pleas.

In U. S. circuit court, Austin, Janry. term, 1875.

MASSIEU ET AL. *vs.* C. H. AIRHEART. } No. 1283.

And now comes the plaintiffs, and, with leave of the court first had and obtained, and amend their petition, & aver that according to and under and by virtue of the Constitution, laws, and treaties of the United States, and under and by virtue of the constitution and laws of the State of Texas, they are entitled to maintain this action in the courts of the United States, & are authorized and permitted to sue in said court.

HANCOCK, WEST AND NORTH,
Plff.' Attys.

And afterwards order was entered on the 8th day of February, A. D. 1875:

32 Defendant has leave to amend.

Amended exceptions and answer endorsed: "Filed Febry. 8th, 1875. M. Hopkins, clerk."

In words, to wit:

Amended exceptions & answer.

In U. S. circuit court at Austin, Jany. term, A. D. 1875.

MASSIEU ET AL. vs. H. C. AIRHEART. } No. 1283.

And now, at this term of the court, comes the said defendant, by his attorneys, and, having first asked and obtained the permission of the court therefor, amends his pleadings herein, and, so amending, excepts generally to the original and amended petitions of plaintiffs herein, & to the amended petition filed herein by plaintiffs on the 6th day of February, A. D. 1875, and says that the same, and the matters and things therein alleged as therein set forth, are insufficient in law to enable them to have and maintain their said action.

And for special exception to the amended petition herein filed by plaintiffs on the 6th day of February, A. D. 1875, said defendant, by his attorneys, says the same is insufficient in law, because he says the said plaintiffs do not set forth therein the facts upon which they rely under the Constitution, laws, and treaties of the United States and under the constitution and laws of the State of Texas, to enable them, as
33 aliens, to sue and to maintain this action in this court, and because said plaintiffs, in said amended petition, rely upon averments of conclusions of law and not upon averments of facts; & of these exceptions defendant prays the judgment of the court.

REAGAN & GREENWOOD,
Attys. for Deft.

And afterwards, on the same day, the following amended petition was filed, endorsed: "Filed February 8th, 1875. M. Hopkins, clerk."
In words, to wit:

Amended petition.

In U. S. C. C., Austin, Jany. term, 1875.

A. R. MASSIEU ET AL. vs. C. H. AIRHEART. } No. 1283.

And now, at this day, came the plaintiffs in the above-named cause, and, with leave of the court first had and obtained, amend their pleadings heretofore filed, & say that all of the said plaintiffs except the said Anna Redding Massieu, were from the first day of October, 1851, and prior to that date, minors & unmarried persons under twenty-one years of age, and so continued to be until the first of Janu'ry, 1870, & therefore they say they are not barred or precluded of their right of recovery in this cause by reason of the possession, if any possession he had, of the said defendant.

HANCOCK, WEST & NORTH,
Plffs.' Attys.

34 And afterwards, to wit, on the same day, defendant filed exceptions and amended answers, endorsed: "Filed February 8th 1875. M. Hopkins, clerk"—
In words, to wit:

Exceptions and amd. answer.

In U. S. circuit court at Austin, January term, A. D. 1875.

ANNA R. MASSIEU ET AL., PLFFS.,
vs.
C. H. AIRHEART, DEFT. } No. 1283.

Now comes the said deft., by his attorneys, & leave of the court first being had, and excepts to the legal sufficiency of the plea of infancy of a portion of the plffs. this day filed, & says the same is not sufficient in law, because the said plaintiffs do not state such facts as will enable the said plffs. to recover in this action.

WORD & JACKSON,
REAGAN & GREENWOOD,
Attys. for Deft.

The said defendant, further amending in this behalf, leave of the court first being had & for plea in bar of plffs., say' that said plffs. were aliens and citizens of the republic of Mexico at the date & time when their pretended right and title accrued to land sued for, and that said plffs. did not take possession and sell the said land within nine years from the date when Anna Matilda Massieu died, under whom plffs. claim title, and that neither one of said plffs. has ever become a
35 citizen of the United States or of the State of Texas, but have remained permanent citizens of the republic of Mexico; wherefore this deft. says that if said plffs. ever had any title, the same has long since been forfeited and escheated to the State; and of this prays the court to hear proof and for judgment.

WORD & JACKSON,
REAGAN & GREENWOOD,
Attys. for Deft.

Plaintiffs' instructions asked.

36 Instructions asked by plaintiff'. Endorsed: "Filed Feby. 15, 1875. M. Hopkins."
1st instruction asked, which is in words as follows:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL.
vs.
C. H. AIRHART. } 1283.

I. The plaintiffs ask the court to instruct the jury as follows:
The grant of land from the State of Coahuila and Texas, dated the 26th day of November, A. D. 1833, to José Ignacio Aguilera, and the subsequent notarial deed dated the 10th day of March, A. D. 1836, to Ana Mathilde Massieu vested the title to the land in suit in the said Ana Mathilde Massieu, and if you believe that her father, Victor Massieu, is dead, and that he died before she did, and that she herself is dead, and that her mother, Anna Redding de Massieu, survived her and is still alive, and that the other plaintiffs, Alexander, Louis, Julia Teresa, and Adefina Massieu, are her only brothers and sisters, and that the said Anna died unmarried and without issue, then, by

37 virtue of the laws in force at the time of her death, the title to the land in suit vested in the plaintiffs as the heirs of the said Anna Mathilde Massieu, deceased.

Given.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

2d instruction asked by plaintiff'. Endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."

Which is in words as follows:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHART. } 1283.

II. The plaintiffs in said cause ask the court to instruct the jury as follows:

The title of the plaintiffs to the land in suit is an older title than that under which the defendant claims, and will entitle the plaintiffs to recover, unless the defendant has established his defenses under his different pleas of the statutes of limitations, and I charge you that the plaintiffs, being alien heirs (if you find that they are in fact aliens) by the laws of Texas in force at the time of the death of Anna Mathilde Massieu, had nine years from that date within which to take possession of or sell the estate, or become citizens, and that during that
38 period of nine years the statutes of limitation based on adverse possession would not run, nor would they commence to run until the expiration of the said nine years. If, then, you find from the evidence that neither the three, five, nor ten years' statutes has run since the expiration of said nine years, leaving out of the computation the entire period from the 28th day of January, A. D. 1861, until the 30th day of March, A. D. 1870, you will find for the plaintiffs.

Refused.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

3d instruction asked by plaintiffs. Endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."

Which is in words following:

U. S. cir. court west. dist. of Texas, Austin. Law.

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHART. } 1283.

III. The plaintiffs in said cause ask the court to instruct the jury as follows:

The title of the plaintiffs to the land in suit was a defeasible title, and if the plaintiffs failed, for the period of nine years, either to take possession of or sell the same, or become citizens, the State had the right, by legal process, to forfeit the land to the State; but no
39 party but the State had that right, and until the State does so forfeit the land the title of such aliens stands on the same footing as other titles.

Given.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

4th instruction asked by plaintiffs. Endorsed: "Filed Feb. 15th, 1875. M. Hopkins, clk."
Which is in words as follows:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL. vs. C. H. AIRHART. } 1283.

IV. The plaintiffs ask the court to instruct the jury as follows:
The defendant sets up as a special defense that he is an innocent purchaser without notice; on this point you are instructed that under the decisions and laws of the State of Texas, this defense can only avail a defendant who holds by a patent from the republic or State of Texas, based upon a valid land-warrant and survey, and does not embrace the character of title exhibited by the defendant.
Given.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

40 5th instruction asked by plaintiffs. Endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."
Which is in words as follows:

U. S. cir. court west. dist. of Texas, Austin. Law.

A. R. DE MASSIEU ET ALS. vs. C. H. AIRHART. } 1283.

V. In case the fourth instruction be refused and not otherwise, the plaintiffs ask the court to instruct the jury as follows:
I further charge you that the elder title will not be postponed to the junior grant where the parties holding the junior title had notice of such elder title, or could, by the use of ordinary caution and diligence, have had notice of the same or learned its location; if, therefore, you believe that both titles were executed at the same place and in accordance with the laws then in force, and the original of each duly deposited in the place required by law, and maps and sketches of the same lodged by the proper officials of the former government in the proper offices, and the lines and corners of the survey made on the ground, then I charge you, if these things were done, they amount to notice, and the pleas of innocent purchaser will not avail the defendant.
Not given, because rendered unnecessary by the 4th instruction.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

41 6th instruction asked by plaintiffs. Endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."
Which is in words following:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL. vs. C. H. AIRHART. } 1283.

VI. The plaintiffs in the above-entitled case ask the court to instruct the jury as follows:
You are instructed that in this proceeding you cannot enquire into the

suggestion made by the defendant of improvements made in good faith, because the same is not a legal defence to the plaintiffs' claim, and cannot be established in this court.

Refused.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

7th instruction asked by plaintiff. Endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."

Which is in words as follows:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET ALS.
vs.
C. H. AIRHART. } 1283.

VII. The plaintiffs ask the court to instruct the jury as follows in the event of the sixth instruction being refused and not otherwise.

42 If you believe from the evidence that the defendant had notice of the plaintiffs' title, or by the use of ordinary caution and diligence could have known of the plaintiffs' title at the date of his purchase, then he is not a possessor in good faith, and cannot avail himself of the benefit of the suggestion of good faith and improvements.

Given.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

8th instruction asked by plaintiff endorsed: "Filed Feb. 15, 1875. M. Hopkins. clk."

Which is in words following:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL.
vs.
C. H. AIRHART. } 1283.

VIII. But in case the court refuses to give the seventh instruction, then the plaintiffs ask the court to instruct the jury as follows:

You are instructed that inasmuch as the defendant does not show claim to more than one-half of the Harris land and improvements he can only be allowed the value of one-half of those improvements; you will therefore ascertain the value of the use and occupation of

43 the whole tract, and from that deduct one-half of the value of the improvements, and at the same time you will find the present value of the land without the improvements.

Refused.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

9th instruction asked by plaintiff endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."

Which is in words as follows:

U. S. cir. court west. dist. Texas, Austin. Law.

A. R. DE MASSIEU ET AL. vs. C. H. AIRHART. } 1283.

IX. The plaintiffs ask the court to charge the jury as follows: The defendant sets up title to two tracts of land, one of about 1,800 acres on the Harris league and the other of about 150 or 200 acres on the Patton survey. In reference to the Patton land claimed by the defendant in his pleadings, as he has failed to show any title to it, you will find a verdict for the plaintiffs. And as to the land on the Harris grant claimed by the defendant, he has only shown a claim to one-half of it. The defendant having entirely failed to show any claim to the Patton land, and having failed to show any claim to more than one-
44 half of the Harris land, I charge you that, without reference to any question of notice or limitation, the plaintiffs are entitled to a verdict in their favor securing to them in any event the land on the Patton grant and one-half the land on the Harris grant claimed by the defendant.

Refused.

HANCOCK, WEST & NORTH,
Attys. for Plaintiffs.

Defendant's instructions asked.

45 Instruction asked by defendant of the court to be given to jury endorsed: "Filed Feb. 15, 1875. M. Hopkins, clk."

Which are in words as follows:

In United States circuit court, Austin, Texas.

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas:

ANNA R. DE MASSIEU ET AL. vs. H. C. AIRHART. } No. 1283.

The defendant, by his attorneys, asks the court to charge the jury:

1st. That if the proof shows that the plaintiffs claim the land sued for by inheritance from and as heirs of Anna Mathilde de Massieu, and that she died in the month of August, 1851, or in the year A. D. 1851, and that the said Anna Mathilde was at that time a citizen of the republic of Mexico and an alien to the State of Texas and to the United States of America, and that said plaintiffs were at the date of her death citizens of the republic of Mexico and aliens to the State of Texas and to the United States of America, and if the proof further shows
46 that said plaintiffs did not become citizens of the State of Texas or of the United States of America, and take possession of said land in nine years from the date of the death of said Anna Mathilde, then the plaintiffs have no title to the land sued for, and you should find for the defendant.

(1.) Refused.

2nd. That if the proof shows that the plaintiffs claim the land sued for by inheritance from, and as the heirs of, Anna Mathi'de de Massieu,

and that at the date of the death of the said Anna Mathilde she was a citizen of the Republic of Mexico and an alien to the State of Texas and to the United States of America, and that at the date of the death of the said Anna Mathilde these plaintiffs were also citizens of the Republic of Mexico, and aliens to the State of Texas and to the United States of America, then the said Anna Mathilde de Massieu, as such alien, had no inheritable blood, and the title to said land could not pass by inheritance from her to plaintiffs, and said plaintiffs, as such aliens, took no title to said land by inheritance from her, and you should find for the defendant.

(2.) Refused.

47 3rd. That if the act of conveyance of the land sued for was made by José Ignacio Aguilera to Anna Mathilde da Massieu, in the Republic of Mexico, on the 10th day of March, 1836; and if at that time the said Aguilera and the said Massieu were citizens of said Republic of Mexico and aliens to the Republic of Texas, and if the Republic of Mexico and the Republic of Texas and their people were then at open war with each other, (and of this fact the courts and juries of the country will take notice from the public history of the country,) and if at the time of said sale said Aguilera did not deliver the actual possession of said land to said Massieu, then we charge you that under these facts there could have been no livery of seizen, and no constructive delivery of the possession of the same, and that said act of sale was inoperative and void, and did not transfer the title to said land from said Aguilera to said Massieu, and you should find for the defendant.

(3.) Refused.

48 4th. If the proof shows that the original title of the plaintiffs to the land in controversy was not in file in or among the archives of the general land-office of the State of Texas, and that the testimonio of said title was not duly recorded in Anderson or Freestone counties, and that the survey of said plaintiffs was not plotted on the map of Anderson County kept in the office of the county surveyor of said county, or in the general land-office of the State of Texas, by virtue of a title on file authorizing the same to be so plotted, and that the defendant had no actual notice of the existence of the title of plaintiffs to said land, and that the defendant had no such other notice as should have paid a prudent man upon reasonable enquiry as to the existence of plaintiffs' title, and as would have enabled him, upon such enquiry, to ascertain the existence of the title of plaintiffs, at the date or dates upon which the defendant acquired his title or titles to the land he claims, then he is an innocent purchaser without notice, and you should find for him.

49 And we further charge you that if any or all of the persons under, by, or through whom the defendant acquired his title to said land, acquired the same as an innocent purchaser or purchasers without notice, as defined in the foregoing charge, then such title or titles inured to the benefit of this defendant, and you should find for him.

(4.) Refused.

5th. The sketch on which is marked a plot of the Aguilera and other grants produced from the General Land-Office, and a copy of which is in evidence before you, is not constructive notice to the defendant, and was *read* constructive notice to those under, by, and through whom he derived his titles, of the existence of the grant to plaintiffs, unless the evidence shows further that it was identified and plotted on the public and official maps in the General Land-Office, so as to show the connexion of the surveys represented in it with the lands adjacent to it, and the locality

and identity of the lands claimed by plaintiff, and unless the proof shows also that said sketch represented a survey of land for which there
50 was a known and valid survey or title in the General Land-Office, and it is not evidence of actual notice for any purpose unless it is shown by the proof that the defendant knew of its existence.

(5.) Not given because rendered inappropriate by instructions given.

6th. That the translated copy of a list or abstract of citias (leagues) and labors of land granted by the government of Coahuila and Texas, &c., certified by the Spanish translator and Commissioner of the General Land-Office, which has been allowed to go in evidence before you, subject to the charge of the court, is not evidence of constructive notice to the defendant of the existence of the grant of land claimed by plaintiffs, unless you believe from the evidence, dates, &c., that the G. Ygnatio Aguilera grant therein referred to is the grant claimed by plaintiffs in this suit, and unless you also believe that the grant therein referred to was on file in the General Land-Office before the defendant acquired his title to the land in controversy.

(6.) Not given because rendered inappropriate by other instructions given.

7th. If you find from the evidence that the defendant has been
51 in the peacible, uninterrupted, and adverse possession of the [land in controversy for three years next preceding the institution of this suit, not including the period of minority of the defendants, and the time during which the statute of limitations was suspended by law, from the 28th of January, 1861, to the 30th of March, 1870, under a legal title from and under the sovereignty of the soil, then you should find for the defendant,] and if you find from the proof that under the foregoing part of this charge, the right of a part of the plaintiffs is barred, and that the right of a part of them is not barred, then you cannot in this suit find for those whose right is not barred, and should find for the defendant.

(7.) Part in brackets given *given*.

8th. That if the proof shows that Anna Mathilde de Massieu survived her father and died intestate in 1851, then her mother inherited one-half of her estate, and her brother and sisters inherited the other half, if she left any estate in lands in the State of Texas, and that if any one or more or all of said heirs of said Anna Mathilde de Massieu failed
52 to become citizens of the State of Texas or of the United States of America, and to take possession of the land which they so inherited, in nine years from the death of said Anna Matilde, or failed to sell the same in said period of nine years from the death of said Anna Matilde, their said heirs, or such of them as have so failed, have no right of action or legal standing in this court, and if the right of action of any one or more or of all of said plaintiffs is so barred, as they must recover on their title as they have sued upon it, you should find for the defendant.

Refused.

So if the proof shows that the defendant has been in the actual, peacible, uninterrupted, and adverse possession of the land in controversy, under title or color of title for three years next before the institution of this suit, then said plaintiffs, or such of them as were of full age for and during that time, and against whom the statute of limitations of three years did run, have no right of action in this suit.

Given.

And if it appears from the proof that the right of action of any

53 one or more of the plaintiffs is so barred, then you cannot find for any of the plaintiffs, and should find for the defendant.

9th. That the plaintiffs must recover, if at al', on the strength of their own title, & not on the weakness of the title of the defendant.

(9.) Given.

REAGAN, GREENWOOD & JACKSON,
Atty's for Deft.

Charge of the court is in words, to wit:

54 *Charge of the court.*

U. S. circuit court western district of Texas, Feby. 15, 1875, January term, 1875.

ANNA R. DE MASSIEU & OTHERS
vs.
C. H. AIRHART.

Woods, circuit judge, charged the jury as follows:

This is an action of trespass to try title, brought by Anna R. de Massieu and her four children, Alexander, Louis, Julia Teresa, and Adelphina Massieu. The land in controversy is situated in Anderson County in this State; it consists of about 2,008 acres, and is particularly described in the petition.

To sustain the issue on their part, the plaintiffs have introduced, as evidence of the title in them—

(1) A grant of land, which it is conceded covers the land in controversy, from the State of Coahuila & Texas, dated the 26th day of November, 1833, to Jose Ignacio Aguilera; and,

(2) A notarial deed, dated March 10, 1836, from Aguilera to Anna Matilda Massieu.

These documents show that on the 10th day of March, 1836,
55 the title to the land in controversy was vested in Anna Matilda Massieu.

The plaintiffs have introduced evidence tending to show that Anna Matilda Massieu, to whom the title was conveyed on March 10, 1836, di'd on the 13th of August, 1851, still seized of the land; that she died unmarried and without issue; that her father died before her, and that she left surviving her her mother, Anna R. de Massieu, and her brothers Alexander and Luis, and her sisters Julia Teresa and Adelphina, who are still in life, and are the plaintiffs in this case. If the evidence establishes these facts, then by virtue of the laws in force at the time of the death of Anna Matilda Massieu, her title became vested in the plaintiffs as her heirs.

If, therefore, you believe from the evidence that Anna Matilda Massieu died on August 13th, 1851, leaving no father living, but leaving the plaintiffs, her mother, brothers, and sisters, as above stated, surviving her, then I instruct you that the plaintiffs have made out a prima facia title to the land, and your verdict should return a general verdict in th ir favor, unless the defendant has established one or more
56 of the defenses which he sets up against the title of the plaintiffs.

The fact, which seems to be conceded, that the plaintiffs are citizens of Mexico, and aliens to the United States and the State of Texas, and that Anna Matilda Massieu, from whom they claim to inherit the land in controversy, was also an alien, does not affect their right to

bring this suit, nor does it effect their title to the lands in suit, unless the State of Texas had taken some steps to declare the title forfeited, of which there is no proof.

If, therefore, under the instructions given you, you shall be of opinion that the plaintiffs have established a prima facie case, you will proceed to the consideration of the defences set up against that title. The first defense set up is, in substance, that for three years next after the cause of action accrued to the plaintiffs, and before said suit brought, the defendant held possession of the premises under title or color of title.

There is evidence tending to show that Airhart, the defendant, took possession of the premises in controversy in 1854, and this fact does not appear to be disputed by the plaintiffs. The defendant claims that he has brought himself within the terms of
57 this three-years statute of limitation. The law says that the title under which the defendant takes possession in order to entitle him to the benefit of this first limitation of three years must be a regular claim of transfer from or under the sover'ignty of the soil, and that if color of title is relied on it must be a consecutive claim of transfer down to the parties in possession, without being regular. You will therefore inquire whether Airhart has shown a consecutive claim of title from the sover'ignty of the soil down to himself. For if he has not held possession under such a chain of title, either regular and perfect, or irregular, he cannot claim the benefit of the three years' limitation. The defendant, you will remember, claims under two distinct titles—one the Robert S. Patton title, which covers 153 acres of land in controversy, and the other, the Edward C. Harris title, covers about 1,855 acres. Both these titles he claims were derived from the sovereignty of the *soil*, & this is evidence tending to show this. The defendant failed to connect himself in any way with the title of Robert S. Patton. There was a link wanting in the chain of title from Patton to himself. So
58 far, then, as the Patton tract is concerned, the defendant cannot claim the benefit of the three years' limitation, and this defense fails as to that portion of the land.

Therefore the defence of the three-years statute of limitations fails as to the whole of the Patton tract. Your inquiry under this defence will therefore be narrowed to the question whether the defendant has proven that for three years after the cause of action accrued to the plaintiffs, and before the commencement of this suit, he has held possession of the Harris tract under a consecutive chain of transfer of title to himself from the sovereignty of the soil.

In passing upon this question you are instructed that the right of action accrued to the plaintiffs when the defendant took possession of the land. That will be your starting-point in computing the lapse of time; you will exclude from the computation of time, so far as each individual plaintiff is concerned, the time of his or her minority; you will also exclude the period from the 28th of January, 1861, to the 30th of March, 1870. If, after excluding these periods, the defendant has
59 satisfied you that he has held possession of the Harris tract under a consecutive chain of transfer of title for the sover'ignty of the soil for three years before the commencement of this suit, then he has made good his defence to the Harris tract as against such of the plaintiffs as have allowed the defendant to maintain his possession for three years after they had reached majority, excluding from the computation the period from Jan'y 28th, 1861, to March 30th, 1870.

The burden of proof to establish this defence is on the defendant, and

if he has not convinced you of all the facts necessary to establish as just set forth, it must fail.

The next defence is that the defendant has had five years' peaceable possession of the premises, cultivating, using, and enjoying the same, and paying taxes thereon, claiming under a deed or deeds duly registered.

Under this limitation it is not necessary to show a consecutive chain of title, but the defendant must claim under a deed to himself duly registered. The defendant, as already said, has not shown a deed to
60 himself for the Patton tract, so that in any event this defence must fail as to all the lands in suit except the Harris tract. As to that portion of the land you will inquire, has the defendant shown that he has had peaceable possession for five years before suit brought; was enjoying and cultivating it; has he claimed that possession under a deed or deeds to himself, duly registered, and has he shown that during the term of five years that the land has been in possession he has paid the taxes assessed upon it? He must satisfy you on all these points before this defence is made out. And the five years must be exclusive of the minority of the plaintiffs and of the period between the 25th January, 1861, and the 30th March, 1870.

The next defence is in substance as follows: That although the grant under which plaintiffs claim is older than the title under which defendant claims, yet the plaintiff neglected to register their title and the defendant acquired his title in good faith, and without notice or knowledge of the title under which plaintiffs claim. Therefore the plaintiffs' title is postponed to the title of defendant, which by reason of the neglect of the plaintiffs to register their title, and of the
61 good faith of defendant in acquiring his title, became the superior and better title. This defence, even if it were a good one, can only apply to the Harris tract, for that is the only part of the lands in controversy to which defendant shows any title in himself. But we instruct you that under the proof in this case this defence is not good as to any part of the land. It is in evidence that both the title of plaintiffs and the title of defendant originated while *in* Texas was a part of Mexico, and subject to her laws, before the declaration of Texas independence and before the adoption of the plan and powers of the provisional government of Texas. In a word, they are both titles emanating from the Mexican government. If you find these facts to be true, we are of opinion, and so instruct you, that under this state of facts the junior title, which is the defendant's, is not entitled to any advantage from the want of registration of the said title o' the plaintiffs. In other words, the fact that the plaintiffs failed to register their title, and that defendant acquired his in good faith and without
62 notice of plaintiffs' title, constitutes no defence to this action. If all the foregoing defences shall in your opinion not be established, you will consider the defendant's claim to the value of his improvements.

The defendant suggests that he and those persons whose estate he has in the lands in controversy have had adverse possession of the same in good faith for at least one year before the commencement of this suit, and that he and those persons whose estate he has have made permanent and valuable improvements on the lands sued for during the time of their occupancy. Under this quasi defence you will first inquire whether the suggestion made by defendant be true. This suggestion can only apply to the Harris tract, for the defendant has shown no title to any other part of the land in controversy. It is not disputed, as we

understand it, that defendant has made lasting and valu'ble improvements on the Harris tract. The point in controversy is whether he had adverse possession in good faith. This a question for your determination upon the evidence. If when defendant took possession or at any time before he made his improvements he had notice of plaintiffs'
63 title, or if by the exercise of ordinary diligence the defendant might have discovered that plaintiffs claimed title to the land, in either case he is not a purchaser in good faith and can claim no benefit from his improvements. But if on the other hand you find that defendant entered upon the land without any knowledge or notice of plaintiff' title, and that he could not have discovered that plaintiffs claimed title by the use of ordinary prudence and care, then the defendant would be entitled to such advantage for his improvements as the law gives possession in good faith. In the event you find that defendant was a purchaser in good faith, you will proceed—

1. To assess the value at the time of the permanent and taxing improvements put by defendant and those under whom he claims upon the Harris tract.

2. To assess the value of the Harris tract without considering the increased value thereof by reason of the improvements made by defendant and those under whom he claims.

3. To assess the value of the use and occupation of said Harris tract while it has been in possession of defendant, computing the same from the commencement of this suit.

64 *Trial-entries.*

United States circuit court in and for the western district of Texas, at Austin.

MONDAY MORNING, *Feby.* 8, 1875.

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHEART. } No. 1283.

This cause called for hearing, came the parties by their respective attorneys, the plaintiffs by Hancock, West, & North & Peeler, and the defendant by Reagan & Greenwood & A. M. Jackson, and upon the pleas and issues joined the case proceeded until the hour of adjournment. And afterwards, on Tuesday morning, Feby. 9, 1875, the following entry appears upon the minutes of the court:

FEB. 9, 1875.

Court met pursuant to adjournment; present, the Hon. W. B. Woods, judge, presiding, and the officers of the court, U. S. marshal, U. S. atty. and clerk.

Entry.

A. R. DE MASSIEU ET AL. *vs.* C. H. AIRHEART. } 1283.

On this day came the parties, by their attorneys, and the jury empanneled in the cause, to wit, Radcliff Platt and eleven others, who was

duly tried, empannelled, and sworn in this cause; and the case continued on the evidence and pleadings, all the days of Tuesday, Wednesday, Thursday, Friday, Saturday, and Monday, when the charge of the court having been delivered, the jury retired to consider of their verdict; and under the written agreement of counsel, it was agreed
65 that the foreman of the jury might return a sealed verdict in the morning, and court adjourned to meet on to-morrow morning at ten o'clock.

And afterwards, to wit, on Tuesday morning, Feby. 16th, 1875, the following entry and judgment appears upon the minutes of the court:

Court met pursuant to adjournment; present, the Hon. Thos. H. Duval, judge, presiding, (Hon. W. B. Woods having left last evening,) and the officers of the court the same as on yesterday.

Judgment.

ANNA REDDING DE MASSIEU, JULIA TERESA Massieu, Adelfina Massieu, Louis Massieu, and Alexander Massieu, plffs.,
vs.
C. H. AIRHEART, OTHERWISE H. C. AIRHEART. deft.

And now at this day came the said plaintiffs above named, to wit, Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Louis Massieu, and Alexander Massieu, by their attorneys, Hancock & West & North, and came also the said defendant, H. C. Airheart, otherwise called C. H. Airheart, by his attys., Reagan & Greenwood, and both said parties announced themselves ready for trial; and there-
66 upon came on to be heard the general and special demurrers & exceptions of the said defendant to said plaintiffs' original and amended petition, and the same being duly considered by the court, it is ordered that the same be overruled; to which ruling of the court the defendant excepts and prays his bill of exceptions may be allowed; and thereupon came on to be heard the various exceptions of the said plaintiffs to the original and amended answers of the said defendant, and the same being duly considered by the court, it is ordered that the special exception of the statute of limitation of three years, and to that part of the said answer suggesting improvements made in good faith, and to the *fact* pleading that the said defendant was an innocent purchaser without notice—the said exceptions of plaintiffs are overruled; and the special exceptions of the said plaintiff' questioning the sufficiency of the said defendant's pleas as to the alienage and claim by inheritance of the plaintiffs being considered, it is ordered that the same be sustained; and to the ruling of the court the said defendant excepts, and the special exceptions of the defendant as to the sufficiency of the plaintiffs' replication of coverture and infancy to the defendant's pleas of the statutes of limitation coming on to be heard, the same was over-
67 ruled, and thereupon defendant excepted. Thereupon came a jury of twelve good and lawful men, who were duly empannelled and sworn according to law, to wit, Radcliff Platt and eleven others, and having had the pleadings of both parties read to them, and having heard the evidence, the arguments of counsel, and the charge of the court, retired to consider of their verdict, and thereupon they returned into court the following verdict, to wit:

We the jury find for the plaintiff the land sued for. We also find the value of the land of the Harris tract, amounting to eighteen hundred and fifty-five acres, at two dollars per acre without improvements. We also find the value of whole improvements on Harris tract at four thousand five hundred dollars, ($4,500.00.)

(Signed) R. PLATT,
Foreman.

Thereupon it is considered and adjudged by the court that the said plaintiffs above named do have and recover of and from the said defendant the land set forth in said plaintiffs' petition, the metes and bounds of which are as follows: being situated on the right and left banks of the Trinity River, in the counties of Anderson and Freestone, and in the State of Texas, and in said western district of Texas,
68 bounded above by the eleven league' which was surveyed for Don Manuel Rionda, and below on the western bank of the river by some lands which were surveyed by the order of the alcalde of Nacogdochez for citizen Simon Sanches, beginning at the northeast corner of the upper league of said Sanches, which is a white oak 30 in. diameter, on the west bank of said Trinity River, and bears north 70° 40′ west, 6⅔ varas from ash, and is the first land-ma'k of this survey; thence with said Sanches' upper line south 45°, west 11,111 varas, to the northwest corner of said Sanches, which is a stake in an opening, and is the second corner of this survey; thence S. 45° east 2,500 varas with the line of *of* the said Sanches' league until arrived at the southwest corner of the same, which is a stake bearing south 48° 30′ east 19 varas from a China oak (encino Chino) 12 in. diameter, and south 31° east 11 varas from a hackberry 20 inches in diameter, and is the 3d corner of this survey; thence south 45° west 9,632½ varas to a stake, which is the fourth corner of this survey, and is bounded by vacant lands; thence north 45° west 7,500 varas to another stake, which is the fifth corner of this survey and the first of the eleven-league survey for M. Rionda; thence north 45° east 20,833⅓ varas, came to the river, where a
69 tree was marked four inches in diameter, and bears N. 84° west from an ash 6 in. diameter and to the south 56° east 60 varas from an ash 5 inches in diameter. These were marked at 100 varas from the river; crossing the river to the east side with 36,766⅔ varas, arrived at the southeast corner of M. Rionda, and with 40,000 varas came to a stake which is the south corner of this survey, and is bounded by vacant lands; thence S. 45° E. 7,500 varas to another stake, which is the seventh corner of this survey, and is bounded by vacant lands; thence S. 45° W. 21,676⅔ varas to a stake on the west bank of the river. This is the eight' corner and the last one of this survey, and is bounded across the river by the southeast corner of the upper league which was surveyed by order of the alcalde of this town for said Sanchez; thence following the meanders of the river up the stream to completing in a straight line northwest 2,500 varas, came opposite the first corner, crossing the river to said corner on the west bank and the point of beginning, containing eleven leagues of land. And a writ of possession is hereby ordered to issue to place said plaintiffs in possession of the said land and evicting the said defendant and any other person claim-
70 ing or in possession of said land by, throug', or under said defendant since this suit was brought. It is further considered by the court that the said plaintiff do have and recover of and from the said defendant all the costs of this suit in this behalf expended, for all of which execution may issue.

It is further ordered that said writ of possession shall not be issued by the clerk for the term of one year from this date, unless previous to that time the said plaintiffs shall pay to the said defendants the excess of the assessed value of the improvements over the value of the use and occupation; but should the said plaintiffs, within one year from this date, pay the said amount to the said defendant, said writ of possession may issue at once on said payment being made; and should the said plaintiff' fail for the space of one year from this date to pay the said amount to the said defendant, then the said defendant shall have six months from the expiration of said year to pay to the said plaintiff' the said assessed value of said land without the improvements, and no writ of possession shall issue until the said six months shall have
71 elapsed; and if, at the expiration of the said six months, the defendant shall fail to pay said assessed value of the land, then the said writ of possession shall issue on behalf of the plaintiff' as above provided for. It is further ordered that as to that part of the land claimed by the defendant and not situated on the Harris grant, being about one hundred and fifty-three acres of land out of the R. S. Patton survey, and described by metes and bounds as follows: beginning where the Harris league line crosses the old Patton line at Fulton's corner, running east $498\frac{98}{100}$ varas to the S. W. corner of O. L. Kimbrough survey in the old Patton line; thence north $1{,}900\frac{30}{100}$ varas to a blackjack tree, marked "R. P." in the old Patton line; thence west $498\frac{96}{100}$ varas to where the Harris league line crosses the N. boundary of the old Patton survey; thence south $1{,}900\frac{80}{100}$ varas to the place of beginning, the plaintiff may have a writ of possession against said deft., and those claiming by, through, or under him since the institution of this suit, and the same is hereby ordered to issue on the adjournment of the court.

Motion for new trial was filed, endorsed, to wit: "No. 1283. Massieu vs. Airhart. Motion for new trial. Filed Feb. 16, 1875. M. Hopkins, clk."

72 *Motion for new trial.*

Circuit court of U. S., west. dist. of Texas, January term, 1875.

ANNA REDDING MASSIEU & OTHERS
vs.
H. C. AIRHART. } No. 1283.

The defendant by attorney moves the court to set aside the verdict of the jury in this cause and grant him a new trial, because—

1st. The verdict is contrary to the law and the charge of the court.

2d. The verdict is contrary to the evidence.

3d. The court erred in its instructions to the jury, and in refusing instructions asked by the defendant, as shown by by defendant's bills of exception.

4th. The court erred in admitting evidence offered by the plaintiffs, and in the exclusion of evidence offered by the defendant, as shown by defendant's bills of exception.

REAGAN & GREENWOOD,
WOOD & JACKSON,
Attys. for Deft.

And afterwards the following entry appears on the minutes of the court:

Order overruling.

TUESDAY, *Febru'y* 16, 1875.

A. R. DE MASSIEU ET AL. *vs.* H. C. AIRHART. } No. 1283.

On this day came on to be heard the motion of the defendant for a new trial in this cause, and the same having been heard, the motion for new trial was overruled by the court.

73 Statement of title-papers by deft. and notice of filing the same, endorsed in words, to wit: "No. 1283. Anna de Massieu & others vs. C. H. Airhart, true name H. C. Airhart. Statement of title-papers by deft. and notice of filing the same. Filed June 1, 1874. M. Hopkins, clerk. Service of within notice, &c., accepted Jan'y, 20, '75. Hancock, West, & North for plffs."

And in words, to wit:

Deraignment of defendant's title.

In the United States circuit court at Austin, June term, A. D. 1874.

UNITED STATES OF AMERICA,
The State of Texas, the western district of Texas:

ANNA R. DE MASSIEU ET AL., PLFFS., *vs.* H. C. AIRHART, DEFT. } No. 1283.

The defendant, H. C. Airhart, herein notifies the plaintiffs that he deraigns his title to the lands described in his answer as follows, to wit:

1st. *2nd.* Original testimonio from the government of Coahuila & Texas to Edward C. Harris, bearing date June 26th, A. D. 1835, for one league of land, which is herewith filed.

2nd. A deed of conveyance from Edward C. Harris to Lestor Hotchkiss, bearing date 9th day of June, A. D. 1840, which is herewith filed.

74 3rd. A deed of conveyance from Lestor Hotchkiss to Daniel H. Vail, bearing date 24th day of April, A. D. 1844, which is herewith filed.

4th. A deed of conveyance from Daniel H. Vail & Isabella Vail to Rufus M. Mynett & Elizabeth H. Mynett, bearing date June 1st, A. D. 1855, which is herewith filed.

5th. A bond for title by R. M. Mynett to Thos. G. Kimbrough, bearing date June 9th, A. D. 1855, which is herewith filed.

6th. A deed of conveyance from R. M. Mynett & Elizabeth H. Mynett to Thos. G. Kimbrough, bearing date 30th day of October, A. D. 1856, which is herewith filed.

7th. A deed of conveyance from Thos. G. Kimbrough to E. M. Dunn & C. H. Airhart, bearing date Novr. 30th, 1868, which is herewith filed.

8th. A deed of conveyance from E. M. Dunn & Ann E. Dunn to Henry C. Airhart, bearing date 3rd day of November, A. D. 1869, which is herewith filed.

To the other tract of land mentioned in deft.'s answer he deraigns title as follows, to wit:

1st. A patent from the State of Texas to R. A. Patton, bearing date 25th day of November, A. D. 1854, a copy of which from the General Land-Office is herewith filed.

75 2nd. A deed from R. S. Patton to T. G. Kimbrough, bearing date 30th day of December, A. D. 1854, which deed is herewith filed.

3rd. A deed of conveyance from T. G. Kimbrough to E. M. Dunn & Henry Airhart, bearing date Feby. 1st, A. D. 1869, which is herewith filed.

4th. A deed of conveyance from Elizabeth Dunn & Ann E. Dunn, bearing date 3rd day of November, A. D. 1869, which is herewith filed.

To Messrs. Hancock, West & North, attys. of record for plaintiffs in the above-entitled cause:

SIRS: You will take notice of the filing of the papers above named by the defts. this day of June, A. D. 1874.

REAGAN, GREENWOOD & CO.,
Counsel for Deft.

Original testimonio to Edward C. Harris.

Endorsed in words to wit: "No. 1283. Massieu vs. Airhart. Copy of protocol. Filed January 18, 1875. M. Hopkins, clerk."

And in words to wit:

Petition No. 250.

Stamp, third denomination, two rials, treasury of the free State of Coahuila and Texas. (Seal.) For the biennial term of 1834 and 1835.

76 To the special commissioner under citizen D. G. Burnet's contract:

Edward C. Harris, a native of the United States of the North, respectfully represents to you that, attracted by the munificent provisions of the colonization laws of this State, he has come here with his family, consisting of eight persons, with the intention of becoming a permanent settler, provided that, in consideration of the accompanying certificate, you see proper to admit him as a colonist, and will assign to him the quantity of land he is entitled to from the unoccupied portion of said contract.

He therefore prays you to grant his petition, which is all that he can expect from your sense of justice.

Nacogdoches, May 22d, 1835.

(Signed) E. C. HARRIS.

Reference.

The applicant is referred with accompanying certificate to the respective contractor, who will report upon the foregoing petition.

Nacogdoches, May 22d, 1835.

Report.

To the Commissioner:

I certify that the applicant is one of the colonists introduced
77 by my principal under the contract celebrated between himself

and the executive of the State, on the 22d of December, 1826. You can therefore issue the order for the survey of the lands he applied for.

Nacogdoches, May 22d, 1835.

DAVID G. BURNET.

By his attorney,
(Signed) ARTHUR HENRIE.

Order.

NACOGDOCHES, *May 22d*, 1835.

Presented with accompanying documents and accepted. Citizen Arthur Henrie, the surveyor, will cause the land the petitioner may select to be surveyed, provided that it is entirely unoccupied. He will examine the field-notes, which will be translated at this office, after which such further action will be had in the premises as may be deemed convenient. I have so directed and hereto set my hand, with two witnesses, according to law.

(Signed) JOSGE ANTO. NIXON, *Commr.*

Attest: (Signed) RADFORD BERRY.
Attest: (Signed) ALBERT EMANUEL.

To the Commissioner:

The land surveyed to colonist Edward C. Harris is located east of Trinity River, distant about forty miles from colonist Nathaniel
78 Robbins, which survey begins at an elm near said river for the first corner, from where a hackberry four inches in diameter bears south 390 east, seven varas distant, and a post-oak 8 inches in diameter bears south 50° west, at seven varas distant; thence south 1,210 varas, to a post-oak for the second corner, from which a post-oak twenty inches in diameter bears south 66° west, at $\frac{6}{10}$ varas distant; thence west 700 varas to a gum for the third corner, from which an ash ten inches in diameter bears south 5° west, at $11\frac{4}{10}$ varas distant; thence south 975 varas to an elm for the fourth corner, from which a post-oak ten inches in diameter bears north 47° east, at 5 varas distant; thence east 680 varas to a post, set in the mud, for the fifth corner; thence south 500 varas to a white oak 30 inches in diameter for the sixth corner, from which a pecan bears south 69° west, at $7\frac{8}{10}$ varas distant; thence east 1,020 varas to the seventh corner, a post set in a marsh; thence south 2,315 varas to the eight' corner, a stake set in the marsh; thence east 4,364 varas to a willow for the north corner, from which an elm four inches in diameter bears north 31° west, at $3\frac{8}{10}$ varas distant;
thence north 5,000 varas to a black-jack 4 inches in diameter,
79 from which another black-jack 5 inches in diameter bears south 12° west, at $28\frac{8}{10}$ varas; thence west, 5,360 varas, to the place of beginning, and completing thus the survey of the sitio (league) of land you directed me to have surveyed. Ten labors of the aforesaid land are classified as unirrigable farming, and the remaining as grazing land, the outlines of which are set forth on the plot herewith accompanied in duplicate. Nacogdoches, June 25th, 1835. Erased—above, void; interlined—destitute, colono, valid.

(Signed) ARTHUR HENRIE,
Surveyor.

(Signed) ADOLFO STEINE,
Translator.

NACOGDOCHES, *June 26th*, 1835.

The surveyor of the sitio (league) of land to colonist Edward C. Harris having been completed, the respective patent thereto will be issued, and of the two plots

[Stamp. Third denomination. Two rials. Treasury of the free State of Coahuila and Texas [seal.] For the biennial term of 1834 and 1835.] returned by the surveyor, one will be attached to this protocol, and the other, both to bear my rubric, to the testimonio, (certified copy.) I have so directed and hereto set my hand, with two subscribing witnesses, according to law, in testimony thereof.

80 (Signed) JORGE ANTO. NIXON, *Commr.*

Attest: (Signed) RADFORD BERRY.

Attest: (Signed) ALBERT EMANUEL.

Patent.

Citizen George Anthony Nixon, special commissioner, appointed by the executive of the State of Coahuila and Texas, to distribute and give possession of lands and to issue patents therefor to colonists under Citizen David G. Burnet's colonization contract.

Whereas Edward C. Harris has been received as a colonist under Citizen David G. Burnet's contract, celebrated with the executive of the State, dated on the 22nd December, 1826; and whereas the aforesaid Edward C. Harris has clearly justified that he is a married man, that his family consists of eight persons, and that he embodies in his person the qualifications prescribed by the colonization law of the 24th March, 1825, in conformity to said law and the instructions by which I am governed, I grant, confer upon, and put, in the name of the State, the aforesaid Edward C. Harris in full and corporal possession of one sitio (league) of land, the locations and boundaries whereof are set forth on the plot and in the field-notes returned by citizen Arthur Henrie,

81 the surveyor, as appears upon this record. Ten labors of the aforesaid land are classified as unirrigable farming, and the remainder grazing, land, according to which classification he will make payment to the State, in accordance with the provisions of article 22 of the aforesaid law, on the terms therein granted, under the penalties therein prescribed. He is notified that he will be required to construct permanent corners at each one of the corners of the land; that he will settle upon and cultivate it, in conformity with the provisions of the aforesaid law; that he will rigidly comply with the requirements of that and other laws in the premises, and that he will never convey the same in mortmain.

Therefore, in the exercise of the powers conferred upon me by the respective law and instructions pursuant thereto, I issue this patent, and direct that a certified copy (testimonio) thereof be made and delivered to the party, to have and to hold the land himself, his children, heirs, and assigns, or any one claiming or to claim the same by, under, or through him or them.

Given at the city of Nacogdoches on the 26th day of June, 1835. In testimony whereof I hereto set my hand, with my two subscrib-

82 ing witnesses, according to law. Interlined, detreira, valid. I certify.

(Signed) JEORGE ANTO. NIXON, *Commr.*

Attest: (Signed) RADFORD BERRY.

Attest: (Signed) ALBERT EMANUEL.

GENERAL LAND-OFFICE,
TRANSLATOR'S DEPARTMENT,
Austin, January 9th, 1875.

I certify the foregoing to be a correct translation from the original Spanish of what purports to be a grant to E. C. Harris, as contained in file 18, pages 379 to 400, inclusive, of the permanent records of this office.

DAVID V. WHITING,
Spanish Translator.

STATE OF TEXAS, GENERAL LAND-OFFICE,
Austin, January 9th, 1875.

I, J. J. Gross, commissioner of the general land-office of the State of Texas, do hereby certify that David V. Whiting, whose signature is attached to the foregoing certificate of translation of what purports to be a grant to E. C. Harris, is the Spanish translator of this office, duly qualified according to law, and that his official acts as such translator are entitled to full faith and credit.

83 In testimony whereof I hereto set my hand and cause the impress of the seal of the general land-office to be stamped on the day and date last above mentioned.

[L. S.]

J. J. GROSS,
Commissioner.

Deed from Edward C. Harris to Lester Hotchkiss. Endorsed, to wit: "No. 1283 & 1286. 3, Instruments. Filed June 1, 1874. M. Hopkins, clerk. Edward C. Harris to Lester Hotchkiss. Deed for one league of land. Recorded in book C, vol. 3rd, page 267, this the 24th day of June, A. D. 1840. Steward A. Miller, deputy clerk co. court. Fee, $10. In words, to wit:

REPUBLIC OF TEXAS,
County of Sabine:

Know all men by these presents that I, Edward C. Harris, of the county of Jefferson and the aforesaid republic, for and in consideration of the sum of four thousand dollars paid to me by Lester Hotchkiss, of the county of Sabine and said republic, have granted, bargained,
84 sold, and released, and by these presents do grant, bargain, sell, and release unto the said Lester Hotchkiss, his heirs and assigns, a certain tract, lot, or parcel of land, being the league of land containing four thousand four hundred and twenty-eight (4,428) English acres of land granted to me, the said Harris, as a colonist in the colony of the empresario David G. Burnett, on the 26th day of June, eighteen hundred and thirty-five, (A. , 1835,) situated on the east bank of the river Trinity, in the now county of Houston, about 40 miles above the place known as Robbins Ferry, on said river; said land being more fully and accurately described in the field-notes of the survey of said land mentioned in the certified copy of the original title of possession delivered to me, possession of which is given to said purchasers. Together with all and singular the rights, rents, and appurtenances to the said land belonging or in anywise appertaining thereto.

To have and to hold the said bargained land and premises to the said Lester Hotchkiss, his heirs and assigns, forever, in fee-simple. And I, the said Edward C. Harris, for myself, my heirs, executors, and administrators, the said bargained land and premises to the said Lester

85 Hotchkiss, his heirs, executors, administrators, and assigns, shall and will warrant and forever defend the same against the lawful claim of every other person or persons whatsoever claiming or to claim the same or any part thereof.

In testimony of which I, the said Edward C. Harris, have hereunto set my hand and affixed my seal this ninth (9th) day of June, eighteen hundred and forty, A. (1840.)

E. C. HARRIS. [SEAL.]

Signed, sealed, and delivered in presence of—
C. M. GOULD.
A. HOTCHKISS.

REPUBLIC OF TEXAS,
Sabine County:

This day E. C. Harris, the subscribing party to the foregoing deed, personally appeared before me, the undersigned authority, and acknowledged the same to be his voluntary act and deed, and that he wishes me to certify the same to the clerk of the county of Houston, that the said instrument might be recorded.

In testimony whereof I have hereunto set my hand and seal of office this 10th day of June, 1840.

WM. P. WYCHE,
Ch. J. P. & Not. Public.

86 THE STATE OF TEXAS,
County of Anderson:

I, J. A. Crawford, clerk of the county court of said county, do hereby certify that the within and foregoing instrument of writing *is* on opposite side of the sheet is duly recorded on pages 388, book D, land-record in my office.

Witness my hand and seal of office at the town of Palestine, Sept. 29, 1852.

J. A. CRAWFORD,
Clerk Court, Anderson Co.

Received for record this 22nd day of June, A. D. 1840.

STEWART A. MILLER,
Deputy Clerk Co. Court.

THE STATE OF TEXAS,
County of Anderson:

I, J. A. Crawford, clerk of the county court of said county, do hereby certify that the within map is duly spread on record on page 390, book D, land record of said county.

Witness my hand and seal of office, at Palestine, Sept. 29, 1852.

[L. S.] J. A. CRAWFORD,
Clerk Co. Court, Anderson County.

87 The preceding sketch is endorsed, to wit: "No. 1283 & 1286. E. C. Harris, league of land in Houston County. Filed June 1st. 1874. M. Hopkins, clk. Filed for record Sept. 23, A. D. 1852, at about 5 o'clock p. m. J. A. Crawford, clk. co. court, A. Co."

88 $43.00.

Received by the hand of David Lasey forty-three dollars, which is in full for the government dues on one league of land surveyed for

Edward C. Harris, titled by G. Ant. Nixon, A. D. 1835, June 26th, Crockett, June 12, 1838.

(Signed) J. H. KIRCHHOFFER,
Per B. L. COW, *Houston Co.*

89 *Peticion No.* 250.

Sello segundo, doce reales; sello del estado de Coahuila y Tejas; para el bienio de 1834 y 1835.

Señor comisionado especial de la empresa del ciudadano David G. Burnet, Edward C. Harris, natural de los Estados Unidos del Norte, con el debido respeto ante Vd. me presento y digo: que atraido por las generosas disposiciones de las leyes de colonizacion de este estado, he venido con mi familia que consta de ocho personas, á radicarme en él, si Vd. tuviera á bien en vista de la adjunta certificacion admitirme en clase de colono; concediendome la cantidad de tierra que me corresponde en los baldios de la referida empresa. Por tanto á V. suplico se sirva otorgarme la gracia que impetre, siendo cuanto espero de la justificacion de Vd.

Nacogdoches, y Mayo veinte y dos de mil ocho cientos treinta y cinco.

EDWARD C. HARRIS.

Corregido. [Scroll.] Pase el interesado con la certificacion que acompaña al señor empresario á quien corresponde para que informe sobre la solicitud que antecede.

Nacogdochez, y Mayo veinte y dos de mil ocho cientos treinta y cinco.

(Signed) JORGE ANTONIO NIXON,
Comisionado.

Señor comisionado, certifico que el interesado es uno de los
90 colonos que ha introducido mi poderdante en cumplimiento de la contrata que tiene celebrada con el supmo. gobno. del estado en fecha veinte y dos de Diciembre de mil ocho cientos veinte y seis. Por tanto Vd. puede expedir la órden de menzura de los terrenos que solicita.

Nacogdochez, y Mayo veinte y dos de mil ocho cientos treinta y cinco.

(Signed) DAVID G. BURNET,
Por su apoderado ARTHUR HENRIE.

Demto.

Nacogdochez, Mayo veinte y dos de mil ocho cientos treinta y cinco. Por presentado y admitido con los documentos que acompaña el agrimensor ciudo. Arthur Henrie hará practicar la medida del sitio de tierra el interesado señale con tal que esté enteramente valdio, y las notas las examinará, traduciendose en esta oficina y se procederá despues, á lo mas que convenga; así lo determiné y firme, con dos testigos, segun la ley.

(Firmado) JORGE ANTONIO NIXON,
Comisionado.

De asta.: RADFORD BERRY.
De asta.: ALBERT EMANUEL.

91 *Notas de medidas.*

SEÑOR COMISIONADO: El terreno medido al colono Edward C. Harris, está situado al lado del este del rio de la Trinidad cosa de cuarenta

millas distante del colono Nataniel Robins, cuya medida empieza desde un olmo cerca del rio citado, que és la primera mojonera, de la cual hay al sur treinta y nueve grados este á siete varas de distancia un palo blanco de cuarto pulgadas de diametro y al sur cincuenta grados oeste, á siete varas de distancia, un encino roble de ocho pulgadas de diametro de allí al sur mil dos cientas diez varas, á un encino roble, que forma la segunda mojonera, de la qual hay al sur sesenta y seis grados oeste á seis decimas de una vara de distancia un encino roble de veinte pulgadas de diametro de allí al oeste setecientas varas á un copal, que forma la tercera mojonera de la cual hay el sur cinco grados oeste á once varas $\frac{4}{10}$ de distancia un fresno de diez pulgadas de diametro. De allí al sur novecientos setenta y cinco varas á un olmo, que forma la cuarta mojonera, de la cual hay al al norte cuarenta y siete grados este, á cinco varas de distancia un encino roble de diez pulgadas
92 de diametro. De allí al este, seis cientas ochenta varas á la quinta mojonera, que es una estaca, que se puso en el pantano. De allí al sur quinientas varas, á un encino blanco, de treinta pulgadas de diametro que es la sesta mojonera, de la cual hay al sur sesenta y nueve grados oeste, á siete varas de $\frac{8}{10}$ distancia un pecan. De allí al este, mil veinte varas á la septima mojonera, que es una estaca que se puso en el pantomo. De allí al sur dos mil tres cientas quince varas, á la octava mojonera, y se puso otra estaca en el pantano. De allí al este, cuatro mil tres cientas sesenta y cuatro varas á la novena mojonera, que es un sans, del cual hay al norte, treinta y un grados oeste, á tres y ocho decimas varas de distancia un olmo, de cuatro pulgadas diametro. De allí al norte cinco mil varas á la decima mojonera, que es un encino chino, de cuatro pulgadas de diametro del cual hay al sur doce grados oeste, á veinte y ocho y ocho decimas varas otro encino chino, de cinco pulgadas de diametro; y de allí al oeste cinco mil tres cientas sesenta varas, al punto de comenzar. Completandose así el apéo del sitio de tierra que Vd. me mandó hiciése medir.

Del expresado terreno, pertenecen diez labores á la clase de tem-
93 poral y lo restante á la de agostadero, siendo su configuracion lo que esta representado en el mapa que por duplicado le acompaña.

Nacogdochez, Junio veinte y cinco de mil ocho cientos treinta y cinco.

(Firmado) ARTHUR HENRIE,
Agrimensor.

(Firmado) ADOLFO STENO,
Traductor.

Decreto.

Nacogdochez, Junio veinte y seis de mil ocho cientos treinta y cinco. Estando concluido el apéo del sitio de tierra del colono Edward C. Harris, extiéndase el título correspondiente, y de los dos mapas que presentó el agrimensor, uno á este expediente y el otro al testimonio, rubricándose ambos por mi; así lo determiné y firmé con dos testigos de mi asistencia, segun la ley, de que doy fé.

(Firmado) JORGE ANTONIO NIXON,
Comisionado.

De asistencia:
(Firmado) RADFORD BERRY.
De asistencia:
ALBERT EMANUEL.

Título de posesion.

El ciudadano Jorge Antonio Nixon, comisionado especial por el supremo gobierno del estado de Coahuila y Tejas, para el repartimiento y posesion de tierras y expedicion de títulos á los colonos en
94 la empresa de colonisacion contratada por el empresario ciudo. David G. Burnet. Por cuanto se ha admitido á Edward C. Harris, como colono en la empresa de colonisacion, contatada por el empresario ciudo. David G. Burnet, con el supo. gobo. del estado, en veinte y dos de Diciembre de mil ocho cientos veinte y seis, y haviendo el expresado Edward C. Harris, plenamente justificado que és casado constando su familia de ocho personas, y encontrándose en el los requisitos que previene la ley de colonizacion de veinte y cuatro de Marzo de mil ocho cientos veinte y cinco, de conformidad con dicha ley y las instrucciones que me rigen; en nombre del estado, concedo, confiero y meto al expresado Edward C. Harris en posesion, real y personal, de un sitio de tierra, cuya situacion y linderos están demarcados en el mapa y notas de medidas, puestas por el agrimenzor ciudadano Arthur Henrie segun se ve en este expediente. Del expresado terreno, pertenecen diez labores á la clase de temporal y lo restante á la de agostadero, lo que sirve de calificacion para lo que debe satisfacer al estado; con arreglo al artículo
95 veinte y dos de dicha ley, concediendose los plazos que designa bajo las penas en él establecido; quedando advertido, que dentro de un año debe construir mojoneras fijas y permanentes en cada ángulo del terreno, que debe poblarlo y cultivarlo en conformidad á lo prevenido por dicha ley, y escrupulosamente cumplir con lo que en ella y otras se ordena, y que jamas lo ha de pasar á manos muertas.

Corregido. [Scroll.]

Por tanto, usando de las facultades que me son concedidas por dicha ley, y instrucciones consiguientes, expido el presente título, y mando se saque testimonio de él, y se le entregue al interesado para que posea y dispute el terreno—él, sus hijos y herederos, y sucesores, ó quien de él ó de ellos causa ó derecho hubiere.

Es dado en la villa de Nacogdochez, á los veinte y seis dias del mes de Junio de mil ocho cientos treinta y cinco, lo que firmo con dos testigos de mi asistencia, segun la ley, doi fé.

(Firmado) JORGE ANTONIO NIXON,
Comisionado.

De asistencia:
(Firmado) RADFORD BERRY.
De asistencia:
ALBERT EMANUEL.

96 Concuerda este testimonio con el original que queda en el archivo de la referida empresa, de mi cargo va fiel y legalmente copiado, confrontado y corregido en dos fojas útiles y necesarias de los sellos correspondientes, lo que firmo con dos testigos de mi asistencia, segun la ley.

En la villa de Nacogdochez, á los veinte y seis dias del mes de Junio del año de mil ocho cientos treinta y cinco—entre renglones—y seis—vale—doi fé.

(Firmado) JORGE ANTO. NIXON, [RUBRICA.]
Comisionado.

De asse.:
(Firmado) RADFORD BERRY.
De asse.:
(Firmado) ALBERT EMANUEL.

REPUBLIC OF TEXAS,
County of Nacogdoches:

Personally appeared before me, Charles S. Taylor, chief-justice of said county & ex-of. notary public, Albert Emanuel, one of the above-signed witnesses, who, being duly sworn, saith that he is acquainted with the signature of Jorge Anto. Nixon, and believes the signature to the annexed document to be genuine, and further made acknowl-
97 edgment of his own signature as a witness.

Witness my hand & seal of office this 5th day of March, 1838.

(Signed) CHAS. S. TAYLOR, [SEAL.]
C. J. of the County & ex-of. N. P.

Presented for record this March 19th, 1838.

(Signed) JACOB ALLBRIGHT,
Clerk of the County Court.

REPUBLIC OF TEXAS,
County of Houston:

I, Jacob Allbright, clerk of the county court of said county, do hereby certify that the above and foregoing instrument is duly recorded in my office, in book A, vol. the first, fol. 194 & 5, 6, & 7.

Witness my hand.

(Signed) JACOB ALLBRIGHT.
Clk. Co. Court.

Fees, 4.50.

STATE OF TEXAS,
County of Anderson:

I, J. A. Crawford, clerk of the county court of said county, do hereby certify that the within and attached instrument of writing is recorded on pages 385, 386, & 387, book D, land record, in my office.

Witness my hand and seal of office in the town of Palestine, Sept. 29th, A. D. 1852.

(Signed) J. A. CRAWFORD, [SEAL.]
Clerk Co. Crt. Anderson Co.

98 REPUBLIC OF TEXAS,
County of Sabine:

Know all men by these presents that I, Lestor Hotchkiss, of the county of Sabine, in the aforesaid republic, for and in consideration of the sum of four thousand dollars paid to me by Daniel H. Vail, of the county of Nacogdoches, and said republic, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Daniel H. Vail, his heirs and assigns, a certain tract, lot, or parcel of land, being the league of land containing four thousand four hundred and twenty-eight (4,428) English acres of land granted to Edward C. Harris, as a colonist, in the colony of the empressario David G. Burnett, on the twenty-sixth day of June, eighteen hundred and thirty-five, (A. D. 1835,) situated on the east bank of the river Trinity, in the now county of Houston, about forty (40) miles above the place known as Robbin's Ferry on said river, said land being more fully and accurately described in the field-notes of the survey of said land contained in the certified copy of the original title of possession delivered to Edward C. Harris, possession of which is given
99 to said purchaser, together with all and singular the rights, rents,

and appurtenances to the said land belonging or in anywise appertaining thereto:

To have and to hold the said bargained land and premises to the said D. N. Vail, his heirs and assigns, forever, in fee-simple.

And I, the said Lester Hotchkiss, for myself, my heirs, executors, and administrators, the said bargained land and premises to the s'd Daniel H. Vail, his heirs, executors, administrators, and assigns, shall and will warrant and forever defend the same against the lawful claim of every other person or persons whatsoever claiming or to claim the same, or any part thereof, by, through, or under me, the said Lester Hotchkiss.

In testimony whereof I have this 24 day of April, A. D. 1844, signed, sealed, and acknowledged the same. In presence of—

LESTER HOTCHKISS. [SEAL.]

GEO. L. CLAPP.
JESSE WRIGHT.

THE REPUBLIC OF TEXAS,
County of Sabine:

This day Lester Hotchkiss, the subscribing party to the foregoing instrument of writing, personally came before me, the undersigned
100 authority, and acknowledged the same as his voluntary act & deed.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 24th day of April, A. D. 1844.

[L. S.]

WM. P. WYCHE,
Ch. J. S. C. & ex-off. Notary Public.

THE REPUBLIC OF TEXAS,
Houston County:

I hereby certify that the foregoing deed of sale from L. Hotchkiss to Daniel H. Vail is duly recorded in book E, pages 274 & 275, county records.

Given under my hand & seal of office, at Crocket, this 10th day of May, A. D. 1844.

[L. S.]

CHARLES H. NELSON,
Clerk Co. Court.

THE STATE OF TEXAS,
County of Anderson:

I, J. A. Crawford, clerk of the county court of said county, do hereby certify that the within and foregoing deed on the opposite side of this sheet is duly recorded on page 389, book D, land record, in my office.

Witness my hand & seal of office, at Palestine, Sept. 29, A. D. 1852.

[L. S.]

J. A. CRAWFORD,
Clerk Co. Court Anderson Co.

101 Deed from Daniel H. & I. Vail to H. M. & E. H. Mynatt, is endorsed in words to wit: "1283 & 1286. Deed from Daniel H. & I. Vail to H. M. & E. H. Mynatt. Filed June 1st, 1874. M. Hopkins, clerk. Filed for record April 7th, 1856, at 7 o'clock a. m. W. H. Vaughn, clerk."

And in words to wit:

STATE OF TEXAS,
County of Nacogdoches:

Know all men by these presents that we, Daniel H. Vail and Issa-

bella Vail, of the above State and county, in and for the consideration of the sum of three thousand dollars ($3,000) paid to us by Rufus M. Mynatt and Elizabeth H. Mynatt, also of said State and county, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said R. M. and E. H. Mynatt, their heirs and assigns, a certain tract or parcel of land, being the league of land containing four thousand four hundred and twenty-eight acres. Said league was granted to Edward C. Harris, as a colonist of the colony of David G. Burnett, on the twenty-sixth day of June, eighteen hundred and thirty-five;
102 being situated east of & near to the river Trinity, in the (now) county of Anderson, said land being more fully and accurately described in the field-notes of the survey of said land, contained in the certified copy of the original title of possession delivered to E. C. Harris, possession of which is given to said purchaser, to have and to hold the said bargained land, with all and singular the rights and appurtenances to the same belonging, to the said R. M. and E. H. Mynatt, their heirs and assigns forever; and we, the said D. H. and I. Vail, for ourselves, our heirs, executors, and administrators, unto the said R. M. & E. H. Mynatt, their heirs, executors, and administrators, shall and will warrant and defend the claim of said bargained land as against the claim of all and every person claiming or to claim the same, or any part thereof. In testimony whereof we hereunto set our hands and affix our seals this first day of June, eighteen hundred and fifty-five.

DANIEL H. VAIL.
ISSABELLA VAIL.

Signed, sealed, and delivered in presence of—
SARAH M. HILLSNEA.
FARRISS MONTGOMERY.

THE STATE OF TEXAS,
County of Nacogdoches:

103 Personally came before me, the undersigned authority, Daniel H. Vail, to me personally known, and stated that he had subscribed and executed the preceding deed, for the consideration and purposes therein stated.

Witness my hand and seal of office, at Sandhill, the 11th day of July, A. D. 1855.

[L. S.] FARRISS MONTGOMERY,
Notary Public, Nacogdoches County.

THE STATE OF TEXAS,
County of Nacogdoches:

Personally came before me, the undersigned authority, Isabella Vail, wife of Daniel H. Vail, parties to the preceding deed bearing date on the 1st day of June, A. D. 1855, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Isabella Vail, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wishes not to retract it.

Witness my hand and seal of office, at Sandhill, the 11th day of July, A. D. 1855.

[L. S.] FARRISS MONTGOMERY,
Notary Public, Nacogdoches County.

104 THE STATE OF TEXAS,
County of Anderson:

I, W. H. Vaugh', clerk of the county court in and for the county of Anderson, hereby certify that the foregoing deed and certificate of acknowledgement are duly recorded in my office, in Book G, record of deeds, bonds, &c., on page' 121 & 122.

Given under my hand and seal of office, at Palestine, the 10th day of April, A. D. 1856.

W. H. VAUGHN,
C. C. A. C.

R. M. Mynatt's title-bond is endorsed, to wit: "No. 1283. R. M. Mynatt's title-bond. Thos. G. Kimbrough. Filed June 1st, 1874. M. Hopkins, cle'k."

In words to wit:

STATE OF TEXAS,
County of Anderson:

Know all men by these presents that I, Rufus M. Mynatt, of the county of Nacogdoches, in the above State, am held and firmly bound unto Thos. G. Kimbrough in the sum of forty-five hundred dollars, to be paid to Thos. G. Kimbrough, his heirs, executors, administrators, or
105 assigns, for the true payment whereof I bind myself, my heirs, executors, administrators, firmly by these presents, sealed with my seal, and dated 9th June, eighteen hundred and fifty-five.

Now, the conditions of the above obligation is such that whereas the said Rufus Mynatt has on this of the date of the present, contracted and bargained to sell to the said Thos. D. Kimbrough, in and for the consideration of twenty-three hundred and six dollars $\frac{25}{100}$ to be paid to the said Rufus M. Minatt in the following manner, to wit, in two payments, one-half on the first day of September, the balance in twelve months, for which I have this day executed my notes, one due the first day of September, for eleven hundred and fifty-three dollars & $\frac{12\frac{5}{100}}{100}$, the other due second day of June, eighteen hundred and fifty-six, both notes bearing eight per cent. interest from the second 'ay of June, eighteen hundred & fifty-five—the last note is for eleven hundred & fifty-three dollars & $\frac{12}{100}$—eighteen hundred and forty-five acres of land situated and lying in the county of Anderson, aforesaid, and being the south part of the E. C. Harris survey, lying upon Cedar Lake, and bounded and butted as follows, to wit: Beginning at the southeast corner of the said Harris league survey, thence north at 669 varas pass the
106 north boundary line of Ybery's third of a league survey, at 2,621 varas set a stake, from which a post-oak 15 in. in diameter, marked thus, "X," bears N. 11° W. 5 varas; another post-oak 10 in. diameter, marked "X," bears S. 7° E. 4 varas; thence west 5,384 varas to the west boundary line of said Harris survey; thence south with said boundary 307 varas to corner of said survey; thence east with the boundary of said survey 1,020 varas to another corner of said survey; thence south 1,005 varas to Cedar Lake; thence with the meanders of said lake to the south boundary line of said survey; thence east with the said south boundary 27.76 varas to place of beginning: Now, upon the payment of the aforesaid described notes Rufus M. Mynatt shall well and truly make, or cause to be made, a good and sufficient title to the aforesaid described tract or parcel of land, then this bond to be null and void; otherwise to remain in full force.

Witness my hand and seal, using a scroll instead of a seal, this June 9th, 1855.

[SEAL.] RUFUS M. MYNATT.

Teste:
GEO. W. TUGGLE.
JOHN WOOLVENTON.

107 THE STATE OF TEXAS,
County of Anderson:

Before me, W. H. Vaughn, clerk of the county court aforesaid, this day personally appeared Rufus M. Mynatt, who was to me made known, and acknowledged that he signed, sealed, and delivered the foregoing bond for all the use and purposes therein set forth.

Witness my hand and seal of office, at Palestine, June 13th, A. D. 1855.

W. H. VAUGHN,
Clerk C. C. A. C.

Filed for record June 13th, 1855, at 1 o'clock p. m.

W. H. VAUGHN, *Clerk.*

Fee, 1.25; paid.

THE STATE OF TEXAS,
County of Anderson:

I, W. H. Vaughn, clerk of the county court of said county, hereby certify that the foregoing bond is duly recorded in my office, in Book F, record of deeds, bonds, &c., on page' 112 & 113.

Given under my hand and seal of office, at Palestine, June 13th, A. D. 1855.

[L. S.] W. H. VAUGHN,
Clerk C. C. A. C.

108 Deed from R. M. Mynatt & wife to Thos. G. Kimbrough, is endorsed to wit: "1283. R. M. Mynatt & wife. Deed to Thos. G. Kimbrough. Filed June 1st, A. D. 1873. M. Hopkins, clerk. Filed for record October 30th, 1856, at ½ past 12 p. m. W. H. Vaughn, clk., C. C. A. Co."

And in words to wit:

THE STATE OF TEXAS:

Know all men by these presents that we, Rufus M. Mynatt and E. H. Mynatt, his wife, of the county of Anderson, in the State aforesaid, in consideration of twenty-three hundred & six & $\frac{25}{100}$ dollars, to us paid by Thomas G. Kimbrough, of the county and State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Thomas G. Kimbrough all that certain tract or parcel of land situated in the county of Anderson, in the State aforesaid, and bounded as follows, to wit: Being the south part of E. C. Harris' survey lying upon Cedar Lake, beginning at the southeast corner
109 of the said Harris league survey; thence north, at 669 varas, pass' the north boundary-line of Ylry's third of a league survey, at 2,621 varas set a stake, from which a post-oak 15 inches in diameter, marked thus, "X," bears N. 11° W. 5 varas, another post-oak 10 in. diameter, marked "X," bears S. 7° E. 4 varas; thence west 5,384 varas

to the west boundary-line of said Harris' survey; thence south with said boundary 307 varas to corner of said survey; thence east with the boundary of said survey 1,020 varas to another of said survey; thence south 1,005 varas to Cedar Lake; thence with the meanders of said lake to the south boundary-line of said survey; thence east with the said south boundary 2,778 varas to place of beginning; containing eighteen hundred and forty-five acres, (1,845 acres,) together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining; to have and to hold, all and singular, the premises above mentioned, unto the said Thomas G. Kimbrough, his heirs and assigns, forever; and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said
110 Thomas G. Kimbrough, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

Witness our hands and seals, using scrawls by way of seals, this 30th day of October, A. D. 1856.

R. M. MYNATT. [SEAL.]
ELIZABETH MYNATT. [SEAL.]

THE STATE OF TEXAS,
County of Anderson:

Personally appeared before me, James W. Gardner, chief-justice in and for said county, R. M. Mynatt, to me well known, whose signature appears to the above deed, who acknowledged that he signed, sealed, & delivered the same for the purposes therein set forth.

Given under my hand and seal of office, at Palestine, this the 30th day of October, A. D. 1856.

[L. S.] J. W. GARDNER,
Chief-Justice A. C.

THE STATE OF TEXAS,
County of Anderson:

Personally appeared before me, J. W. Gardner, chief-justice in and for said county, Elizabeth H. Mynatt, wife of R. M. Mynatt, one of
111 the parties whose name appears to the within deed bearing date October 30th, 1856, and after being examined privily and apart from her husband, and after the same was fully explained to her, acknowledged she signed, sealed, & delivered the same for the purposes therein contained, and that the same was her own free act, and that she wished not to retract the same.

Given under my hand and seal of office, at Palestine, this 30th day of October, A. D. 1856.

[L. S.] J. W. GARDNER,
Chief-Justice A. C.

THE STATE OF TEXAS,
County of Anderson:

I, W. H. Vaughn, clerk of the county court in and for the county of Anderson, hereby certify that the foregoing deed and certificates of acknowledgement are duly recorded in my office in Book G, record of deeds, bonds, &c., on pages 356 & 357.

Given under my hand and seal of office, at Palestine, this 14th day of November, A. D. 1856.

[L. S.] W. H. VAUGHAN,
Clerk C. C. A. C.

112 Deed from Thos. G. Kimbrough to E. M. Dunn and C. H. Air-

hart. Endorsed to wit: "1283. Thos. G. Kimbrough. Deed to E. M. Dunn and C. H. Airhart. Filed June 1, 1874. M. Hopkins, clk. Filed for record in my office at 3 o'clock p. m. 6th January, 1869. W. H. King, clerk C. C. A. Co. Recorded Book M, pages 411, '12, & '13."

In words to wit:

STATE OF TEXAS,
Co. of Anderson:

Know all men by these presents that I, T. G. Kimbrough, of the county and State aforesaid, in consideration of nineteen hundred and forty-five $\frac{78}{100}$ dollars paid to me by E. M. Dunn and C. H. Airhart, of the county of Houston and State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, and release unto the said E. M. Dunn and C. H. Airhart all that certain tract or parcel of land situated in aforesaid county and State, bounded as follows: (29) Being the south part of E. C. Harris' survey, lying upon Cedar Lake, beginning at the southeast corner of the said Harris survey; thence north, at V.
113 669, pass' the north boundary-line of Ylry's third of a league survey, at V. 2,627 set stake, from which a post-oak 15 in. in diameter, m'rk' thus, "X," b'ars north 11° W. 5 V.; another post-oak 10 in. in diameter, m'k' "X," b'ars S. 7° E. V. 4; thence W. V. 5,384 to the west boundary-line of said Harris survey; thence S. with said boundary-line V. 307 to corner of said survey; thence E. with the boundary of said survey V. 1,020, to another corner of said survey; thence S. V. 1,005 to Cedar Lake; thence with meanders of said lake to the S. boundary-line of said survey; thence E. with the said S. boundary-line V. 2,776 to place of beginning, containing 1,855 acres, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining; to have and to hold, all and singular, the premises above mentioned, unto said E. M. Dunn and C. H. Airhart, their heirs and assigns, forever; and I do hereby bind myself, my heirs and assigns, forever, and I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises
114 unto said E. M. Dunn and C. H. Airhart, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal, using scrawl for seal, this 30th day of Nov., 1868.

[L. S.] THOS. G. KIMBROUGH.

Witness':
J. E. CALHOUN.
G. DUKE KIMBROUGH.

[Int. rev. stamps: eight, 50 cents each.]

STATE OF TEXAS,
County of Anderson:

Before me, W. H. King, clerk of the county court in and for said county of Anderson, personally appeared Thomas G. Kimbrough, well known to me, and acknowledged he signed and delivered the foregoing instrument of writing for all the purposes and conditions therein expressed or implied.

Given under my hand and seal of office, at Palestine, on the 6th day of January, A. D. 1869.

[L. S.] W. H. KING,
Clerk Co. Ct. A. Co.

STATE OF TEXAS,
County of Anderson:

Know all men by these presents that I, T. G. Kimbrough,
115 hereby bind myself to give title to one hundred and fifty-three acres of land, more or less, to E. M. Dunn & Airhart, for and in consideration of one hundred and four dollars and twenty-two cents.

T. G. KIMBROUGH.

Witness:

JAN'Y 6TH, 1869.

[Int. rev. stamps, two, 50 cents each.]

THE STATE OF TEXAS,
County of Anderson:

Before me, W. H. King, clerk of the county court in and for said county, personally appeared T. G. Kimbrough, who acknowledged he had signed and delivered the foregoing instrument of writing for all the purposes and conditions therein expressed.

Given under my hand and seal of office 6th January, A. D. 1869.

[L. S.] W. H. KING,
Clerk Co. Ct. A. Co.

STATE OF TEXAS,
County of Anderson:

I, W. H. King, clerk of the county court in and for the county of Anderson and said State, do hereby certify that the annexed and foregoing instrument and acknowledgment was this day duly recorded in my office, in Book M of the records of deeds for said county, on pages 411, '12, & '13.

Witness my hand and seal of office, at Palestine, this 23rd day of April, 1869.

[L. S.] W. H. KING,
Clk. Co. Ct. A. Co.

116 Deed from Elbert M. Dunn & Ann E. Dunn to Henry C. Airhart, is endorsed to wit: "1283. Deed to land from Elbert M. Dunn & Ann E. Dunn, to Henry C. Airhart. Filed June 6th, 1874. M. Hopkins, clerk. Filed in my office for record the 26th day of November, A. D. 1869. W. H. King, clerk C. C. A. C."

And in words to wit:

THE STATE OF TEXAS,
County of Anderson:

This deed, made and entered into on this the 3rd day of November, A. D. 1869, between Elbert M. Dunn and his wife, Ann C. Dunn, of the first part, and Henry C. Airhart of the other part, all of s'd co. & State, and who were heretofore joint owner's of certain lands under a purchase and deeds from one T. G. Kimbrough, s'd land being the same on which s'd Dunn & Airhart now live, witnesseth: That the s'd Elbert M. Dunn and his wife, Ann E. Dunn, for and in consideration of the sum of eight hundred dollars in gold, the receipt of which is hereby acknowledged, and of the further consideration that s'd Airhart is to pay the balance of the purchase under s'd purchase from said Kimbrough, hath and does by this deed give, grant, bargain,
117 sell, convey, and enfeoff unto the said Henry C. Airhart, his heirs,

executors, administrators, and assigns, the following described tracts or parcels of land lying and being in said county & State, and more fully described as follows, to wit: Being the south part of the E. C. Harris league, lying upon Cedar Lake, beginning at the southeast corner of s'd Harris survey; thence north at 669 vs. pass the north boundary-line of Ylry's third of league survey, at 2,621 vs. set a stake, from which a post-oak 15 inches in diameter, marked thus, "X," brs. N. 11° *V.* 5 vs., another post-oak 10 ins. diamt., marked "X," brs. S. 7° E. 7 vrs.; thence west 5,384 vs. to the the west boundary-line of s'd Harris' survey; thence south with s'd boundary-line 307 vs. to corner of s'd survey; thence east with the boundary of s'd survey 1,020 vrs. to another corner of s'd survey; thence south 1,000 vrs. to Cedar Lake; thence with the meanders of s'd lake to the south boundary-line of s'd survey; thence east with the south boundary 2,776 vrs. to the place of beginning, containing eighteen hundred & fifty-five (1,855) acres; and also the following other tract or parcel of land, being also in said co. &
118 State, known as R. S. Patton's headright, and bounded as follows, to wit: Beginning where the Harris league line crosses the old Patton line, at Fulton's corner, running east $498\frac{96}{100}$ vars., to the southwest corner of C. L. Kimbrough's, dec'd, survey in the old Patton line; thence north $1{,}900\frac{86}{100}$ vrs. to a black-jack tree, marked R. P., in the old Patton line; thence west $498\frac{96}{100}$ vrs. to where the Harris league line crosses the north boundary of old Patton survey; thence south $1{,}900\frac{80}{100}$ vrs. to the place of beginning; to have and to hold unto the said Henry C. Airhart, his heirs, ex'rs, and administrators, and assigns forever, in absolute right and title, together with all the rights, privileges, and appurtenances thereto belonging and appertaining.

And we, the said Elbert M. Dunn and his wife, Ann E. Dunn, do hereby warrant, and will forever defend, the right and title in and to the above-described tracts of land unto the s'd Henry C. Airhart, his heirs, ex'rs, adm's, and assigns, against the claim or claims of any and all persons whatever.

In testimony of which we, the said Elbert M. Dunn and his wife,
119 Ann E. Dunn, have hereto set our hands and seals, using scrawls for seals, on this the 3rd day of November, A. D. 1869.

E. M. DUNN. [SEAL.]
ANN E. DUNN. [SEAL.]

In the presence of—
JOSEPH A. WRIGHT,
THO. J. JOHNSON.

THE STATE OF TEXAS,
County of Anderson:

Before me, John H. Morrison, judge county court in and for Anderson County, personally appeared E. M. Dunn, well known to me, and acknowledged he signed, sealed, and delivered the foregoing instrument of writing for all the purposes and considerations therein stated or implied. And at the same time and place personally appeared Mrs. Ann E. Dunn, wife of the said E. M. Dunn, who, being examined separate and apart from her husband, and having explained the nature of the foregoing instrument fully to her, she acknowledged she signed, sealed, and delivered the same for all the purposes and considerations therein stated or implied, of her own act and deed, without the fear or
120 dread of any person, and did not wish to recant her acts.

Given under my hand and official seal of office, at Palestine, the 26th Novr., 1869.

[L. S.] JOHN H. MORRISON,
County Jud' A. Co.

[Int. revenue stamps, 4, each 50 cts. *cents.*]

THE STATE OF TEXAS,
County of Anderson:

I, W. H. King, clerk of the county court in and for the county of Anderson and State , do hereby certify that the annexed and foregoing instrument and acknowledgement was this day duly recorded in my office, in Book N of the records of deeds, &c., for said county, on pages 51, 52, & 53.

Witness my hand and seal of office, at Palestine, this 27 day of December, 1869.

[L. S.] W. H. KING,
Clk. Co. Ct. A. Co.

To the other tract mentioned in deft.'s answer he deraigns title as follows, to wit:

1st. A patent from the State of Texas to R. S. Patton, bearing date 25th day of November, 1854, a copy of which from the General Land-Office is herewith filed, to wit:

121 (Endorsed:) No. 367, vol. 11 is dc. "R. S. Patton. ⅔ of a league & labor." Filed June 6, 1874. M. Hopkins, clk.

[No. 357, vol. 11, 1st class.]

In the name of the State of Texas, to all to whom these presents shall come, know ye:

I, E. M. Pease, governor of the State aforesaid, by virtue of the power vested in me by law, and in accordance with the laws of said State in such case made and provided, do by these grant to Robert S. Patton, his heirs and assigns forever, two-thirds of a league and one labor of land, situated and described as follows:

In Houston district, Anderson County, upon Lake Creek, a tributary of the Trinity River, and about 12½ miles N. 83° W. from Palestine, by virtue of headright certificate No. 119, issued by the board of land commissioners of Houston County on the 1st day of March, 1838, beginning at Isaac Barnett's S. W. corner, a stake from which a post-oak brs. N. 65° E. $14\frac{7}{10}$ varas, m'k'd "X R. P.;" another brs. N. 73° E. 13 varas, m'k'd "X;" thence S. 45° E. at 630 varas, a stake on said Barnett's S. line, from which a post-oak No. 51½° W. 14 vrs., m'k'd "X R. P.;" another brs. N. 35° W. 10 varas, m'k'd "X;" thence west with the N. line of M. M. Ybarbe survey at 950 varas, creek at 5,037 vrs.

122 N. W. corner of said Ybarbe's survey, from which a pin-oak brs. N. 18 E. 3 vrs., m'k'd "P," from which an over-cup oak brs. S. 12° W. 4 vrs., m'k'd "X;" thence N. 41° W. 200 varas, a stake about 60 yds. east of Cedar Lake, a post from which a pin-oak brs. S. 5° E. 3 vrs., m'k'd "X," and two others m'k'd "X;" thence N. 1,800 vrs., a stake 15 vrs. west of John Erwin S. W. corner, from which an over-cup oak brs. S. 25° W., m'k'd "X," a pecan brs. N. 59 W. 8 vrs., m'k'd "X;" thence S. with the S. line of said Erwin's survey 3,968 vrs., a stake from which a black-jack brs. S. 5° E. 7 vrs., m'k'd "B. P.;" another brs. E.

12 vrs., m'k'd "X;" thence N. with Erwin's E. line 2,150 vrs. a stake on the E. line of said Ybarbe's survey, from which a N. 6 vrs. S. 32° E. 15 vrs., m'k'd ⟨X⟩ a post m'k'd "X," brs. N. 65° W. 10 vrs.; thence east with John Cotton's S. line, 4,318 vrs., to a stake on Barnett's line; thence S. 45° W. 5,137 vrs. with Barnett's line to the place of beginning.

Hereby relinquishing to the said Robert S. Patton and *her* heirs or assigns forever all the right and title in and to said land heretofore held and possessed by the said State, and I do hereby issue this letter-pattent for the same.

123 In testimony whereof I have caused the great seal of the State to be affixed, as well as the seal of the general land-office.

Done at the city of Austin on the twenty-fifth day of Nov., in the year of our Lord one thousand eight hundred and fifty-seven.

[L. S.] E. M. PEASE,
Governor.

S. CROSBY,
Comr. Gl. L. Office.

GENERAL LAND-OFFICE,
Austin, June 3rd, 1874.

I, J. J. Groos, commissioner of the general land-office of the State of Texas, hereby certify that the foregoing is a true and correct copy from the record kept in this office.

In testimony whereof I have hereunto set my hand and affix' the impress of the seal of said office the date last above written.

[L. S.] J. J. GROSS,
Commissioner General Land-Office.

Patent cancelled under act Feb. 3d, 1854, in consequence of conflict with an older title, Feb. 5th, 1857.

(Signed) ELGIN,
By P. W. H.

124 Deed from R. S. Patton to T. G. Kimbrough is indorsed in words to wit: "1283. R. S. Patton. Deed to T. G. Kimbrough. Filed for record at 1 o'clock p. m., Decr. 30, 1854. W. H. Vaughan, clerk C. C. A. C. Filed June 1st, 1873. M. Hopkins, clerk."

And in words to wit:

THE STATE OF TEXAS,
County of Anderson:

Know all men by these presents that I, Robert S. Patton, of said State and county of Houston, for and in consideration of the sum of three thousand seven hundred dollars to me in hand paid by Thomas G. Kimbrough, before signing and sealing of these presents, the receipt of which is hereby acknowledged, *I* have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to said Thomas G. Kimbrough, and his heirs and assigns forever, the following-described tract of land, viz: Two-thirds of a league and one labor of land situated in Houston district, Anderson County, upon Lake Creek, a tributary of Trinity River, and about 12½ miles N. 83° W. from Palestine, & bounded as follows: Beginning at Isaac Barnett's, S. W. corner, a stake from which a post-oak brs. N. 13° E. 14 7/10 varas, marked "X R. P.," another bs. N. 73° E. 13 varas, marked "X;" thence S. 45° E.

at 630 varas, a stake on said Barnett's south line, from which a post-oak bears N. 51° W. 14 varas, marked "X R. P.," another bears N. 35° W. 10 varas, marked "X;" thence west with the north line of M. M. Ybarbe's survey, at 950 varas, creek 5,037 varas, the northwest corner of said Ybarbe's survey, from which a pin-oak bears N. 18° E. 3 varas, marked "R. P.," from which an over-cup bears S. 12° W. 4 varas, marked "X;" thence N. 41° W. 200 varas to a stake, about 60 yards east of Cedar Lake, a post from which a pin-oak bears S. 5 E. 3 varas, marked "X," and two others marked "X;" thence north 1,800 varas to a stake 15 varas west of John Erwin's S. W. corner, from which an over-cup oak bears S. 25 west, marked "X," a pecan bears N. 59° W., 8 varas, marked "X;" thence east with the south line of said Erwin's survey at 3,968 varas, a stake from which a black-jack brs. S. 5° E. 7 varas m'k'd "R. P.,"
126 another brs. E. 12 varas, marked "X;" thence N. with Erwin's east line at 2,150 varas a stake on the east line of said Ybarbe's survey, from which a red oak bears S. 32 E. 15 varas, marked "H," a post marked "X," bs. N. 65° W. 10 varas; thence east with John Colton's S. line 4,318 varas to a stake on Barnett's line; thence S. 45° W. 5,157 varas with said Barnett's line to the place of beginning, being the same land granted to said Patton by the State of Texas by patent dated 25th day of November, 1854.

To have and to hold said tract of land as above mentioned and described, with all the appurtenances thereto belonging, to said Thomas G. Kimbrough and his heirs and assigns forever. And I, the said Robert S. Patton, will warrant and forever defend the right and title of said land & premises to said Kimbrough and his heirs and assigns forever against the claims of myself, my heirs and assigns, and against the claim or claims of all persons whatever.

In testimony whereof I, the said Robert S. Patton, have here-
127 unto subscribed my name and affixed my seal, using scroll for seal, this 30th day of December, A. D. 1854.

[L. S.] R. S. PATTON. [SEAL.]

Signed, sealed, and delivered in the presence of—
R. A. REEVES,
THOMAS BERRY.

THE STATE OF TEXAS,
County of Anderson:

Before me, W. H. Vaughan, clerk of the county court in and for said county of Anderson, this day personally came R. S. Patton, whose signature appears as the grantor to the above deed, and acknowledged that he had signed, sealed, and delivered the same for all the uses and purposes therein stated.

Witness my hand and seal of office, at Palestine, December 30th, A. D. 1854.

[L. S.] W. H. VAUGHAN,
Clk. C. C. A. C.

THE STATE OF TEXAS,
County of Anderson:

I, W. H. Vaughan, clerk of the county court in and for said county, do hereby certify that the within deed is duly recorded in my office in Book E of land-record, on pages 507 & 508.

Given under my hand and seal of office, at Palestine, January 1st, 1855.

[L. S.] W. H. VAUGHAN, *C. C. A. C.*

128 Deed from T. G. Kimbrough to E. M. Dunn and Henry Airhart, endorsed in words, to wit: "1283. T. G. Kimbrough to E. M. Dunn and Henry Airhart. Filed June 1st, 1874. M. Hopkins, clerk. Deed. Filed in my office for record at 10 o'clock a. m., on this 12th March, A. D. 1869. W. H. King, clerk C. C. A. Co."

And in words to wit:

Warrantee deed.

This indenture, made the 1st (first) day of February, in the year of one thousand eight hundred and sixty-nine, between T. G. Kimbrough, of the county of Anderson, and State of Texas, as party of the first part; E. M. Dunn and Henry Airhart, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one hundred and five dollars $\frac{38}{100}$, lawful money of the United States, to me in hand paid by the said parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators forever released and discharged from the same, by these presents has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents
129 does grant, bargain, sell, alien, remise, release, convey, and confirm unto the said parties of the second part, and to their heirs and assigns forever, all that tract of land situated in the county of Anderson, and State of Texas, known as R. S. Patton headright, bounded as follows: Beginning where the Harris league line crosses the old Patton line at Fulton's corner, running east 498 $\frac{96}{100}$ varas to the S. W. corner of C. L. Kimbrough's, dec'd, survey in the old Patton line; thence north 1,900 $\frac{80}{100}$ varas to a black-jack tree, marked R. P. in the old Patton line; thence west 498 $\frac{96}{100}$ vrs. to where the Harris league line crosses the north boundary of the old Patton survey; thence south 1,900 $\frac{80}{100}$ varas to the place of beginning;

Together with all and singular the tenements and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remain*ed* and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in and to the same and every part and parcel thereof, with the appurtenances: To have and to hold the above
130 granted, bargained, and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to have to their own proper use, benefit, and behoof forever.

[Internal revenue stamps 6 (six) of 5 cents each.] [Internal revenue stamps 10 (ten) of 2 cents each.]

And the said T. G. Kimbrough, for himself and his heirs, executors, and administrators, do' hereby covenant, grant, and agree to and with the second parties of the second part, their heirs and assigns, that the said T. G. Kimbrough, at the time of the sealing and delivery of these presents, is lawfully seized in and possession of a good, absolute, and indefeasible estate of inheritance, in fee simple of and in all and singular the above granted and described premises with the appurtenances and all appertaining thereto, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner aforesaid. And that the said parties of the second part, their heirs and assigns, shall and may at all times hereafter peaceably and quietly have,

hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without
131 any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, his heirs or assigns, or any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever. And also that the said party of the first part and his heirs, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore granted premises, by, from, under, or in trust for him or them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said parties of the second part, their heirs and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the *l*etter and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said parties of the second part, their heirs and assigns forever, as by the said parties of the second part, their heirs or
132 assigns, or they or their counsel learned in the law, shall be reasonably advised or required. And the said T. G. Kimbrough and his heirs, the above-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances unto the said parties of the second part, their heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

T. G. KIMBROUGH. [SEAL.]

Sealed and delivered in the presence of—

L. F. AIRHART.
JAMES M. ABLE.

THE STATE OF TEXAS,
County of Anderson:

Before me, W. H. King, clerk of the county court in and for the said county of Anderson, personally appeared L. F. Airhart, who, being duly sworn, says that he signed the foregoing instrument along with James M. Able as a witness, by request of the parties, and heard the
133 grantor acknowledge he had executed the same for all the purposes and considerations therein expressed or implied.

Given under my hand and seal of office the 12th March, A. D. 1869.

[L. S.] W. H. KING,
Clerk C. C. A. Co

THE STATE OF TEXAS,
County of Anderson:

I, W. H. King, clerk of the county court in and for the county of Anderson, and said State, do hereby certify that the annexed and foregoing instrument and acknowledgement was this day duly recorded in my office in book M, of the records of deeds for said county, on pages 425, '26, '27, & 428.

Witness my hand and seal of office, at Palestine, this 13th day of May, 1869.

[L. S.] W. H. KING,
Clerk Co. Ct. A. Co.

Bill of exceptions of defendant are endorsed: "Filed Feb. 16, 1875. M. Hopkins, clk."

Are in words to wit:

134 *Deft.'s 1st bill of exception.*

U. S. circuit court, 5th circuit and western district of Texas, January term, 1875.

ANNA R. MASSIEU ET ALS. *vs.* H. C. AIRHART. } No. 1283.

Be it remembered that on the trial of the above entitled cause, (commenced on the 8th day of February, 1875,) the plaintiffs read their original petition in the words and figures following, to wit:

In the United States circuit court, at Austin, Texas.

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas:

To the honorable the circuit court of the United States for the western district of Texas, sitting at Austin, Texas:

The petition of Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu, who will hereafter be styled the petitioners, shows unto the court that your said petitioners are citizens of the republic of Mexico, and reside in the city of Mexico, in said republic.

Your said petitioners bring this their suit, by permission of the court, against one C. H. Airhart, who is a resident of the State of
135 Texas and who resides in Anderson County, in said State and western district.

And your petitioners show that on the first day of July, A. D. 1869, your petitioners were lawfully seized and possessed in fee, and were the legal owners of the following tract of land lying and being in the State of Texas, and situated in the said county of Anderson, and in the county of Freestone, in said State, and more particularly described by metes and bounds as follows: Being situated on the right and left banks of the Trinity River, bounded above by the eleven leagues which were surveyed for Don Manuel Rionda, and below on the western bank of the river by some lands which were surveyed by the order of the alcalde of Nacogdoches for citizen Simon Sanches, beginning at the N. E. corner of the upper league of said Sanchez, which is a white oak, 30 in. dia., on the W. bank of said Trinity River, and bears N. 70 40 W. 6⅗ v's from an ash, and is the first landmark of this survey; thence with said Sanchez' upper line, S. 45° W. 11,111 v's to the N. W. corner of said Sanchez, which is a stake in an opening, and is the second corner of this survey; thence S. 45° E. 2,500 v's, with the line of
136 said Sanchez' league until arrived at the S. W. corner of the same, which is a stake bearing S. 48° 30′ E. 19 v's from a Chi-

nes' oak (encino China) 2 in. dia., and S. 31° E. 11 v's from a hackberry 13 in. dia., and is the third corner of this survey; thence S. 45° W. 9,632½ v's, to a stake which is the fourth corner of this survey, and is bounded by vacant lands; thence N. 45° W. 7,500 v's, to another stake, which is the fifth corner of this survey and the first of the eleven leagues surveyed for Mr. Rionda; thence N. 45° E. 20,833⅓ v's, came to the river where a tree was marked 4 in. dia., and bears N. 84° W. from an ash 6 in. dia., and to the S. 56° E. 60 v's from an ash 5 in. dia.; these were marked at 100 v's from the river; crossing the river to the E. side, with 36,766⅔ v's arrived at the S. E. corner of Mr. Rionda, and with 40,000 vs. came to a stake which is the sixth corner of this survey, and is bounded by vacant lands; thence S. 45° E. 7,500 v's, to another stake, which is the seventh corner of this survey, and is bounded by vacant lands; thence S. 45° W. 21,676⅔ v's, to a stake on the E. bank of the river. This is the eighth corner and the last one of this survey, and is bounded accross the river by the S. E. corner of the upper league, which was surveyed by order of the alcalde of this
137 town for said Sanchez; thence following the meanders of the river up the stream to completing in a straight line N. W. 2,500 v's came opposite the first corner, crossing the river to said corner on the W. bank, and the point of beginning.

Your petitioners further represent that being so seized and actually possessed of the above tract of land on the said first day of July, A. D. 1869, the said C. H. Airhart illegally, and with force and arms, entered upon said tract of land and ousted and ejected your petitioners from the same, trod down the grass, dug up the dirt, cut down and carried away the timber, and enjoyed the rents, profits, use, and occupation of the same from the said last-named date hitherto with a strong hand, down to the present date and day of trial, and now still continues to unlawfully, and with force and arms, withhold the possession of said land from your petitioners, who are now the owners of it, to the damage of your petitioners in the sum of forty thousand dollars, and your petitioners say the land is of the value of one hundred thousand dollars.

Premises considered, your petitioners pray for citation to Anderson County for the said C. H. Airhart, and on the trial for a judg-
138 ment for their damages, costs, and a writ of possession.

HANCOCK & WEST.
Plff. Attys.

Mr. C. H. Airhart will take notice that this action is brought as well to try title as for damages.

HANCOCK & WEST.
Plffs.' Attys.

Whereupon the defendant read his general demurrer or exception as follows:

Circuit court at Austin, January term, 1873.

THE UNITED STATES OF AMERICA,
Western District of the State of Texas:

ANNA REDDING DE MASSIEU, JULIA TERESA Massieu, Adelfino Massieu, & Alexander Massieu, plffs.,
vs.
C. H. AIRHART, DEFT. } No.

And now comes the said defendant, by attorney, and says that the

petition of the said plaintiffs, and the matters and things therein contained, in manner and form as the same are therein stated and charged, are not sufficient in law to require of him any answer, and he excepts and demurs to the same for insufficiency, and prays the judgment of the court, &c.

MOORE & SHELLEY,
REAGAN & WORD & JACKSON,
Attys. for Deft.

139 And, for answer, the said defendant says he is not guilty of the said several supposed wrongs, injuries, and trespasses laid to his charge, or any or either of them, or any part thereof; and of this he puts himself upon the country, and c.

MOORE & SHELLY & REAGAN.
WORD & JACKSON,
Attys. for Deft.

And, further answering, the said defendant says that he and those under whom he claims, by regular title from and under the sovereig'ty of the soil, for more than three years next preceding the commencement of this suit, deducting therefrom the time the statute of limitations was suspended by law, were and are and have been in peaceable adverse and uninterrupted possession of the following-described lands, being part of lands sued for in this action, using, claiming, and enjoying the same for more than the three years aforesaid adversely to the said plaintiffs and all others, to wit: A tract of land, containing eighteen hundred and forty-five acres, described as follows: "All that certain tract or parcel of land situate in the county of Anderson, in the State aforesaid, (Texas,) and bounded as follows, to wit, being at the
140 south part of E. C. Harris' survey, lying upon Cedar Lake, beginning at the southeast corner of the said Harris league survey; thence north, at 1,669 varas, passed the north boundary-line of Ylry's third of a league; at 2,621 varas, set a stake, from which post-oak, 15 in. diameter, marked X, bears N. 11° W. 5 varas; another post-oak, 10 in. diameter, marked X, bears S. 7° E. 4 varas; thence west 5,384 varas to the west boundary-line of said Harris survey; thence south with the said boundary 307 varas, to corner of said survey; thence east with the boundary of said survey 1,020 varas, to another of said survey; thence south 1,005 varas to Cedar Lake; thence with the meanders of said lake to the south boundary-line of said survey; thence east with the said south boundary 2,776 varas to the place of beginning. And also the following-described tract or parcel of land, being part of the said lands sued for in this suit, to wit: All that tract of land, situated in the county of Anderson and State of Texas, known as R. S. Patton's headright, bounded as follows: Beginning where the Harris league line cross' the old Patton line at Fulton's corner, running east $498\frac{96}{100}$ varas
141 to the S. W. corner of C. L. Kembrough's survey, in the old Patton line; thence north $1{,}900\frac{80}{100}$ varas to a black-jack tree, marked R. P. in the old Patton line; thence west $498\frac{96}{100}$ varas to where the Harris league line crosses the north boundary of the old Patton survey; thence south $1{,}900\frac{80}{100}$ to the place of beginning;" and this he is ready to verify. And defendants disclaim any right, title, or possession of and to any other portion of the land claimed by the said plffs. in their said action. Wherefore he prays judgment if the said plaintiffs ought to have their suit, &c.

And, for further plea and answer in this behalf, the said defendant says the said plaintiffs ought not to have or maintain their aforesaid action against him, because, he says, that he and those under and

through whom he claims have had peace'ble, uninterrupted, and adverse possession of the two above-described tracts of land, claiming, cultivating, using, and enjoying the same as their and his own, and paying taxes due thereon under a deed and deeds duly registered, for more than five years next before the commencement of this suit, deducting the time therefrom during which the statute of limitations was
142 suspended by law, and this he is ready to verify; wherefore he prays judgment, &c.

And, for further plea and answer in this behalf, the said defendant says actio non, because he says that he and those under whom he claims had and have had peaceable, uninterrupted, and adverse possession of the two tracts of land above described, claiming, using, cultivating, and enjoying the same adversely to all others, with lines and boundaries well marked and defined as above, for more than ten years next before the commencement of this suit, deducting therefrom the time during which the statute of limitations was suspended by law; and this he is ready to verify. Wherefore he prays judgment, &c.

And the said defendant, further answering and pleading, says actio non, because he says that if the said plaintiffs ever had any right to the said real estate, lands, tenements, and hereditaments in plaintiff's petition mentioned, or right to enter or right of entry into and upon the same, being that portion claimed by said defendant, the said plaintiffs have wholly failed to make entry therein and thereon, within the ten years next before the commencement of this suit, or within ten years next after their rights, if any they ever had, accrued; and this
143 the said defendant is ready to verify. Whereupon he says the said plaintiffs are forever barred by reason of no*n* entry; and of this he prays judgment, &c.

MOORE & SHELLY,
REAGAN,
WORD & JACKSON,
Attys for Deft.

And, in addition to the foregoing pleas and answers, the said defendant comes and suggests to the court, now here, that he and those under whom he claims entered in and upon the lands and tenements sued for in this action in good faith, under a title em*i*nating from the sover'ignty of the soil, about the year 1850, when the said lands were wild and unimproved; that he, and those under whom he claims, and for whose improvements he paid, have had adverse possession of the said two tracts of land in good faith since the said year 1850, and that he, and those under whom he claims, have made permanent and valu'ble improvements on the lands sued for during the time he and they have had possession of the same, by clearing, fencing, and improving said lands, and building substantial and permanent buildings, dwelling-
144 houses, out-houses, stables, lots, wells, gin-houses, and cribs, as shown by the bill of particulars hereto attached; and he prays compensation for the same.

Bill of particulars, viz:

Clearing & fencing, & putting in cultivation 210 acres of land, at $15 per acre $3,150 00
Dwelling-house, kitchen, out-houses, small house, cotton-gin, screw & press, stables & lots $3,000 00

C. H. AIRHART, *Deft.*,
By MOORE, SHELLY, REAGAN,
WORD & JACKSON,
Attys. for Deft.

And the court having heard argument thereupon overruled the demurrer; to which ruling of the court the defendant excepted.

And thereupon the plaintiff read his amended petition, filed February 6th, 1875, in words and figures following, to wit:

Defts'. 2nd bill of exceptions.

In U. S. circuit court, Austin, January term, 1875.

MASSIEU ET AL. *vs.* C. H. AIRHART. } No. 1283.

And now comes the plaintiffs, and, with leave of the court first had and obtained, *and* amend their petition, & aver that, according to and under and by virtue of the Constitution, laws, and treaties of
145 the United States, and under and by virtue of the constitution and laws of the State of Texas, they are entitled to maintain this action in the courts of the United States, and are authorized and permitted to sue in said court.

HANCOCK & WEST, & NORTH.
Piffs'. Attys.

Defendant read his general and special demur'er, filed February 6th, 1875, as follows, to wit:

MASSIEU ET AL. *vs.* H. C. AIRHART. } No. 1283.

And now, at this term of the court, comes the said defendant, by his attorneys, having first asked and obtained the permission of the court therefor, amended his pleadings herein, and, so amending, excepts generally to the original and amended petition filed herein by plaintiffs on the 6th day of February, A. D. 1875, and says that the same and the matters and things therein alleged as therein set forth, are insufficient in law to enable them to have and maintain their said action.

And for special exception to the amended petition herein filed by plaintiffs on the 6th day of February, A. D. 1875, said defendants,
146 by his attorneys, says the same is insufficient in law, because he says the said plaintiffs do not set forth therein the facts upon which they rely under the Constitution, laws, and treaties of the United States, and under the constitution and laws of the State of Texas, to enable them as aliens to sue and to maintain this action in this court, and because said plaintiffs in said amended petition rely upon averments of conclusions of law, and that, upon averments of facts & of these exceptions, defendant prays the judgment of the court.

REAGAN & GREENWOOD,
Attys. for Deft.

And for further plea and amended answer herein, said defendant disclaims any title or claim to any of the land sued for by plaintiffs, except so much thereof, if the same be in boundaries claimed by plaintiffs as in said defendant's former pleas, filed herein, mentioned and described as belonging to him, as therein stated.

REAGAN & GREENWOOD,
Attys. for Deft.

147 And the court, after argument upon demurrers, overruled the same; to which ruling of the court the defendant excepted.

Whereupon the defendant read his amended answer, filed January 8, 1875, in words and figures as follows, to wit:

Defts'. 3rd bill of exceptions.

In U. S. circuit court at Austin, Texas, January term, A. D. 1875.

MASSIEU ET AL. *vs.* H. C. AIRHART. } No. 1283.

Now comes the defendant, by his attorneys, and having obtained leave of the court therefor, amends his answer herein, and, amending, charges and avers that the plaintiffs herein claim a pretended title, by inheritance from one Anna Matilda de Massieu and as her heirs-at-law to the land sued for; and defendant further avers that the said Anna Matilda de Massieu was born, lived, and died a native-born citizen of the republic of Mexico; was an alien to the Government of the United States of America, and to the State of Texas at the time of her death, and that the plaintiffs in this suit are native citizens of the said
148 republic of Mexico, & are aliens to the Government of the United States of America and to the State of Texas, and were such citizens of the republic of Mexico, and aliens to the Government of the United States of America, and to the State of Texas, at the time at which they pretend that their said title to the land in controversy accrued to them, and that said plaintiffs have at no time been citizens of the United States of America, or of the State of Texas; wherefore this defendant alleges and charges that by reason of the alienage of the said Anna Matilda de Massieu, and of the said plaintiffs to this suit, said plaintiffs ought not to have and maintain their aforesaid action against him; and of this he prays the judgment of the court, and for judgment as in his original and amended answers.

WORD & JACKSON,
REAGAN & GREENWOOD,
Attys. for Deft.

Further amending in this behalf, defendant charges and avers that the tract of land first mentioned in his original answer is a part of the head-right league of the land granted to Edward C. Harris by
149 the government of Coahuila and Texas, situated in Anderson County, Texas; and that the second tract of land, described in said original answer, is a part of the head-right survey of Robert S. Patton, situated in said Anderson County, Texas; and, further amending, the said defendant suggests to the court that he and those whose estate he has in the land and tenements mentioned in this and his original and amended answers, and sued for in this suit, have had adverse possession of the same in good faith for more than one year next before the commencement of this suit, and that he, and those persons whose estate he has, have made permanent and valuable improvements on the lands sued for during the time he and they have had such possession of the same, to wit, clearing, opening, and fencing 210 acres of land at $10 per acre, $2,100.00; building dwelling-house, outhouse, kitchen, stables, well, gin-house, gin-stand, screw, and press, $1,500.00, and he prays that he may be permitted to introduce proof of the value of the

same, and that he may recover the value of such permanent and valuable improvements.

REAGAN, GREENWOOD & GOOLD,
WORD & JACKSON, &
SHELLY & MOORE,
For Deft.

150 And thereupon the plaintiffs read *his* demurrer, filed January 8, 1875, to the said amended answer, and in words and figures as follows, to wit:

January term, 1875. In U. S. circuit court.

MASSIEU ET ALS. *vs.* AIRHART. } No. 1283.

And now at this day come the plaintiffs and, with leave of the court first had and obtained, *and* amend their pleadings, and say*s*:

That they except to so much of the deft.'s amended answer as seeks to set up the defense of alienage, and seeks to set up the defense of a want of right or power in the plffs. to have by inheritance or claim as heirs through and from an alien ancestor.

The' further except to the said pleas as vague & indefinite, & as presenting no issuable matter. And of this he asks judgment.

And for answer they deny all and singular the matters stated in said amended and original answers.

HANCOCK, WEST & NORTH,
Plffs.' Attys.

151 Whereupon, after argument, the court sustained the said demurrer of the plaintiffs to the said amended answer of the defendant. And to this ruling of the court the defendant excepted.

And a jury being empannelled and the pleadings read, the plaintiffs offered as evidence of their title a certified copy from the general land-office of the State of Texas of a grant by the State of Coahuila and Texas to José Ignacio Aguilera of eleven leagues of land, together with the certificates and endorsements thereon.

Copy of title in Spanish, José Ygnacio Aguilera. 11 *leagues.*

152 Estado libre é independte. de Coahuila y Texas.

Marzo 22 de 1830. Se concedió al solicitante la venta de los once sitios d. tierra sobre las margenes del rio Trinidad.

Espediente original formado pa. la posecion de once sitios de tierra, vendidos pr. el suprmo. govno. del estado, al C. José Ygnacio Aguilera.

1250 ps. Nacogdoches, Novbre. 27 de 1833.

Filed in general land-office by Enrique A. G. Mexia, July 14th, 1873.
L. E. E. KELLNER, *Chf. Clk.*

Peticion al supmo. gobno.

Sello tercero, dos reales; sello del estado de Coahuila y Texas; para el bienio de 1830 y 1831.

EXMO. SOR. GOBERNADOR: El ciud. José Ygnacio Aguilera, natural

de la ciudad de Mejico, ante V. E., con el debido respeto, hago presente, que careciendo de terrenos para la agricultura y cria de ganados, suplico á V. E. se sirva, en uso de sus facultades, concederme en venta once sitios de tierra, sobre las margenes del rio Trinidad, ó en el parage que me paresca mas conveniente á mis intereses, ya sean todos unidos, ó ya en distintos puntos, ofreciendo poblar y cultivar dichas tierras dentro del termino que señala la ley de colonizacion del estado de 24 de Marzo de 1825, satisfaciendo su importe en los terminos que proviene el artío. 24 de la citada ley; suplicando igualmente á V.
153 E. se digne concederme los plazos para el pago, conforme al art. 22 de la misma, ofreciendo cumplir exactamente con todas las demas obligaciones que me corresponden. Por todo lo expuesto—A V. E. pido y suplico se sirva deferir á mi solicitud, en lo que recibiré gracia.

Méjico, 10 de Marzo de 1830.

J. YGNACIO AGUILERA.

Auto de consecion.

LEONA VICARIO, 22 *de Marzo de* 1830.

Conforme al artículo 24 de la ley de colonizacion de 24 de Marzo de 1825, otorgo en venta al suplicante los once sitios de tierra que solicita, en los terminos valdios del estado, en el paraje que señala, ó en el que mas convenga á sus intereses, ya sean todos unidos, ó ya en distintos puntos. El comisionado general que tiene nombrado este gobierno, lo meterá en posecion dedichos sitios, y expedirá el correspondiente título, calificando previamente la clase y calidad de los expresados terrenos, para el señalamiento de lo que debe satisfacer por ellos al estado, para cuyo pago le concedo los plazos que designa el art. 22 de la referida ley. Dése por la sria. al interesado copia de su peticion y este decreto, para que ocurriendo con ella al comisionado, surta los efectos que son consiguientes.

VIESCA.
SANTIAGO DEL VALLE,
Srio.

Es copia. Leona Vicario, 22° de Marzo de 1830.
(Firmado) SANTIAGO DEL VALLE,
Srio.

154 *Peticion pa. la posecion.*

Sello tercero: dos reales. Habilitado por el estado de Coahuila y Texas, para el bienio de 1828 y 29, 30 y 31, 32 y 33.
(Firmado) WILLIAMS.

SEÑOR COMISIONADO: El ciudadano Samuel M. Williams, admor. de correos de Austin, apoderado del Sor. Presbiterio Don Ignacio Aguilar, como mas haya lugar en derecho y bajo las protestas utiles y necesarias, me presento diciendo: Que mi parte obtiene derecho, con arreglo al artículo 24 de la ley de colonizacion del estado, de 24 de Marzo de 1825, á onze sitios de tierra que la otorgo en venta el supremo gobierno de este estado, con fecha 22 de Mzo. de 1830, segun lo acredita el documento espedido por la scria. del mismo supremo gobierno, que acompaño. Y conveniendo á mi parte tomarlos junto ó colindante con los terrenos que tengo solicitado, á favor de los Sres. Dn. Andres y Don Pedro Va-

rela, en su nombre ruego á V. justicia mediante se sirva mandar se me dé título de posecion personal sobre el rio Trinidad ó arroyo Navasota, los referidos onze sitios, colindantes de los terrenos de los señores citados y mandar practicar cuantas diligencias sean conducentes al interes de mi parte. En la inteligencia de que ofresco cultivarlos de conformidad con lo prevenido por la ley, y á cumplir con las demas obligaciones de la misma, por tanto. A V. suplico se sirva atender á esta solicitud en que recibiré gracia y justicia.

155 Villa de San Felipe de Austin á 18 de Sepe. de 1833.

(Firmado) SAMUEL M. WILLIAMS.

Auto pa. las mensuras.

NACOGDOCHES, 17 *de Octubre de* 1833.

Por presentado y admitido en quanto ha lugar en dro. con el documto. qe. acompaña. el agrimensor C. José Ma. Carbajal, practicará las medidas de los once sitios qe. la parte solicita en los parajes qe. indica spro. qe. pa. ello haya lugar, previa citacion de colindantes si las hubiere, y las notas y mapas qe. de ellos formare, me los remitivá pa. en su vista proseder á lo mas qe. conbenga. Así por este auto lo mando y firmo, con los de mi asistencia segun la ley.

(Firmado) VICENTE ALDRETE.

De assa.:

(Firmado) J. JUSTO D. LIENDO.

De asta.:

(Firmado) JOSÉ PINADA.

Nota de medidas.

SOR. COMICIONADO: El terreno que he medido para el Sor. D. José Ygnacio Aguilera, á virtud de la órden de V. que precede, esta cituado sobre las vandas derecha y izquierda del rio Trinidad colindante por arriba con los onze sitios que se midieron para Dn. Manuel Rionda, y por abajo por la parte occidental del rio con unos terrenos qe. se midieron por orn. del alcalde de Nacogdoches, para el ciudadano Simon Sanches.

Comensando desde la esquina de noreste del sitio mas alto de

156 dho. Sanches q. es un encino blanco de treinta pulgadas de diametro sobre la margen del oeste de dho. rio y queda al norte setenta grados cuarenta minutos oeste, seis y tres quintas varas de un fresno, y forman la primera mojonera de esta medida.

De allí con la linea alta de dho. Sanches al sur cuarenta y cinco grados oeste onze mil ciento onze varas á la esquina del noroeste de dho. Sanches qe. es una estaca en una planta, y es la segunda mojonera de esta medida.

De allí al sur, cuarenta y cinco grados este dos mil quinientas varas, con la linea del fondo del sitio citado del mencionado Sanches, hasta llegar á la esquina del suroeste del mismo qe. es una estaca, y queda al sur cuarenta y ocho grados, treinta minutos este dies y nuebe varas de un encino chino doze pulgadas de diametro y al sur treinta y un grados este onze y dos quintas varas de un palo blanco de trese pulgadas de diametro qe. es la tercera mojonera de esta medida.

De allí al sur cuarenta y cinco grados oeste nuebe mil seis cientas treinta y dos, y una tercia vara á una estaca, q. es la cuarte mojonera de esta medida, y colinda con tierras valdias.

De allí, norte cuarenta y cinco grados oeste siete mil quinientas varas á otra estaca, q. es la quinta mojonera de esta medida, y primera de los onze sitios del Sor. Rionda.

157 De allí al norte cuarenta y cinco grados este con veinte mil ochocientas treinta y tres y una tercia varas se llegó al rio, en donde se marcó un arbol de quatro pulgadas de diametro q. está al norte ochenta y cuatro grados oeste cuatro varas de un fresno seis pulgadas de diametro, y al sur sincuenta y seis grados este seis varas de un fresno, cinco pulgadas de diametro. Estos se marcaron con cien varas del rio: se pasó el rio al margen oriental, con treinta y seis mil seis cientas sesenta y seis y dos tercias varas se llegó á la esquina sureste, del Sor. Rionda; y con cuarenta mil varas se llegó á una estaca que es la sexta mojonera de esta medida, y colinda con tierras valdias.

De allí al sur, cuarenta y cinco grados este, siete mil quinientas varas, á otra estaca que es la septima mojonera de esta medida y colinda con tierras valdias.

De allí, al sur cuarenta y cinco grados oeste, veinte y un mil seis cientos sesenta y seis y dos tercias varas, á una estaca, sobre la margen oriental del rio; es la octava y última mojonera y colinda rio de por medio con la esquina del sureste del sitio mas alto q. se medió por órden del alcalde de este pueblo para Sanches, segun he citado ya en estas notas; y

De allí siguinendo los meandros del mencionado rio arriba, hasta
158 completar en linea recta al noroeste dos mil quinientas varas, se enfrentó á la primera mojonera y se pasó el rio á ella sobre la margen del oeste, comprehendiendo en estos limites onze sitios de tierra de los q. tres citios son de temporal y los ochio sitios restantes de agostadero y su configuracion es la q. se vé en el mapa q. por duplicado acompaño á V. Tachado—citado—no vale—Novbre., Nacogdoches, 23, 1833.

(Firmado)

JOSÉ M. J. CARVAJAL, *A. G.*

Auto pa. estender el título.

Sello tercero, dos reales; sello del estado de Coahuila y Texas; para el bienio de 1830 y 1831. Valga pa. el vienio de 1832 y 1833. Ybaroo.

NACOGDOCHES, 25 *de Nobre. de* 1833.

Estando concluida la mensura de los once sitios del presvitero ciudno. José Ygnacio Aguilera, estiendase el título correspondiente y de los mapas que por duplicado ha presentado el agrimensor ciudno. José Maria Carbajal, agregnese mio á este expedte. y otro al testimonio rubricandose ambos por mi. Así, por este auto lo mando y firmo con los testigos de mi asistencia, segun la ley.

(Firmado) VICENTE ALDRETE.

De assta.:

(Firmado) JUAN SANTOS.

De assta.:

(Firmado) MANL. PEREZ.

159 *Título de posecion.*

Sello primero, seis pesos; sello del estado de Coahuila y Texas; para el bienio de 1830 y 1831. Valga pa. el vienio de 1832 y 1833. Ybaroo.

Vicente Aldrete, comicionado por el supremo govierno del estado de Coahuila y Texas, para posecionar á varios Mejicanos, que por venta les tiene concedidos terrenos el mismo supremo govierno en este departemento de Texas.

Por cuanto el presvitero ciudadano José Ygnacio Aguilera, natural de la ciudad de Méjico, tiene concedidos por el eccelentísimo señor governador, once sitios de tierra, en clase de comprador, segun el superior decreto de fecha veinte y dos de Marzo de mil ochocientos treinta, que en copia autentica ha presentado su apoderado ciudadano Samuel Williams, vecino de la villa de San Felipe de Austin, cuya copia hace cabeza en este expediente: en nombre del estado, le confiero, concedo y meto en posecion efectiva y personal de once sitios de tierra, sobre las bandas derecha é izquierda del rio Trinidad, pues sus linderos están demarcadas en el mapa y nota de medidas, puestas por el agrimensor, ciudadano José Maria Carbajal, las que originales obran agregadas á este dicho expediente: del expresado terreno, pertenecen tres sitios á la clase de temporal, y los ocho sitios restantes á la de agostadero, con arreglo á lo cual deberá satisfacer al estado la cantidad de un mil dos
160 cientos cincuenta pesos, de conformidad con lo dispuesto en el artículo veinte y cuatro de la ley de colonizacion de fecha veinte y cuatro de Marzo de mil ocho cientos veinte y cinco, en los plazos que concede en su artículo veinte y dos, bajo las penas allí establecidas; que dando advertido, que dentro de un año contado desde la fecha de este documento construirá mojoneras de cal y canto en todos los ángulos del terreno; que debe poblarlo y cultivarlo con arreglo á lo dispuesto en la referida ley; que cumplirá escrupulosamente con todo cuanto en ella se ordena y que jamas lo pasará á manos muertas. Por tanto: usando de las facultades que me son concedidas á virtud de mi comicion por la ley é instrucciones consiguientes, expido él presente título y mando que se saque testimonio de todo este expediente y se entregue al interesado para que posee y dispute, por suyos propios y los once sitios que se le han vendido, él, sus herederos, y subsecores ó quien de dé de ellos causa hubiere, accion ó derecho representare, por ser así la voluntad del estado. Es dado en la villa de Nacogdoches á los veinte y sies dias del mes de Noviembre del año de mil ochocientos treinta y tres. Firmado por mi, con dos testigos de mi asistencia, segun la ley.

(Firmado) VICENTE ALDRETE.

De asta.:

(Firmado) JOSÉ MA. CHIRINOS.

De asta.:

(Firmado) JUAN SANTOS.

162 GENERAL LAND-OFFICE,
Austin, 22 *August*, 1873.

I, Theo. Goldbeck, translator in said office, bonded and sworn according to law, hereby certify that the foregoing and annexed on 10 pages is a correct copy of a title in Spanish for eleven leagues of land in the name of José Ygnacio Aguilera, together with a true representation of the plat annexed to said title on file in the Spanish archives of this office.

(Signed) THEO. GOLDBECK,
Translator.

THE STATE OF TEXAS,
General Land-Office:

I, Jacob Kuechler, commissioner of the general land-office of the State of Texas, hereby certify that Theo. Goldbeck is translator in said office; that he is bonded and sworn according to law, and that his acts as such are entitled to full faith and credit.

In testimony whereof I hereunto set my hand and cause the seal of said office to be affixed, at Austin, the 22d August, 1873.

[SEAL.] (Signed) JACOB KUECHLER,
Com. Gen. Land-Office.

(Indorsed:) Copy of title in Spanish. José Ygnacio Aguilera. 11 leagues. E. A. G. Mexia, esq. Fee, $6.50.

163 And the plaintiff offered also a translation in English of the said Spanish document, which translation is in words and figures following, to wit:

Secon seal, for the years of 1830 and 1831. Good for the years 1832 and 1833.

YBARRO.

EXCELLENCY: Citizen José Ygnacio Aguilera, a native of the city of Mexico, before your excellency with due respect I represent, that being without lands for agricultural and grazing purposes, I pray your excellency to grant me in sale, in virtue of your powers, eleven leagues of land on the banks of the Trinity River, or in any place which may appear most suitable to my interests, either in one body or in separate places, offering to settle and cultivate them within the term fixed by the law of colonization of that State of 24 of March of 1825, paying its value according to the terms granted by article 22d of the above-mentioned law, and I offer to comply exactly with all the other obligations which may be incumbent upon me. By the above to your E. I beg and pray my petition may be granted, for which I will receive favor.

Mexico, 10th of March, of 1830.

JOSÉ YGNACIO AGUILERA.

LEONA VICARIO, *22nd March of* 1830.

In conformity with article 24th of the law of colonization of 1825, I grant in sale to the petitioner the eleven leagues of land he prays
164 for within the vacant property of the State in the place he describes, or in that which may appear most suitable to his interests. The general commissioner appointed by this government will put him in possession of said leagues and will issue to him the corresponding title previously describing the quality of said lands for their valuation to be paid for by him to the State, for which payment I grant him the terms specified by article 22d of the above-mentioned law. The petitioner will receive from the secretary's office a copy of the above petition, and this decree which he will present to the commissioner for his compliance therewith.

VICSCA.
SANTIAGO DEL VALLE,
Secretary.

A copy. Leona Vicario, 22nd of March of 1830.
SANTIAGO DEL VALLE,
Secretary.

To the commissioner:

Citizen Samuel M. Williams, postmaster of Austin, attorney of the presbiter, Dr. Ygnacio Aguilera, as best may be in law and with all the necessary and legal protests, I present myself, praying that the party

whom I represent obtained a right according to the article 24 of the law of colonization of the State of 24th of March of 1825, to eleven leagues of land granted him in law by the supreme government of this
165 State, under date of 22d of March, of 1830, as shown by the document issued by the secretary's office of the same supreme government, which I accompany. And as it suits the party I represent to have them next to or bounded by the lands I have petitioned for in favor of Messieurs Don Andres and Don Pedro Varela, I ask justice permitting you order that personal title of possession may be given me on the river Trinity or Narayoto Creek of said eleven leagues, bounded by the lands of the gentelmen above mentioned, and order all steps be taken which may be conducive to the interest of my party, in the understanding that I offer to cultivate them in conformity with the preventions of the law, and to comply with the other obligations of the same, I therefore to your Ey. beg that this petitioned may be considered for which I will receive favor &c.

Town of San Felipe de Austin, 18th of September of 1833.

SAMUEL WILLIAMS.

Order of measurement (or survey.)

NACOGDOCHES, *October* 7 of 1833.

As presented and admitted according to law with the document he accompanies, the surveyor citizen, José Maria Caibajal, will survey the 2 leagues (eleven) petitioned for in the locality asked for, it
166 being possible previous citation of those who may have adjoining boundaries, if any, and the notes and maps which he will make will be such to me, so that I may in their examination proceed to that which may be most suitable. I by this act thus order, signing it with assisting witnesses according to law.

VICENTE ALDERETE.

Assisting: I. JUSTO DE LIENDO.
Assisting: JOSÉ PINEDA.

Notes of the survey.

Mr. COMMISSIONER: The land I have surveyed for Mr. Don José Ygnacio Aguilera, in virtue of your order which precedes, is situated on the right and left banks of the Trinity River, bounded above by the eleven leagues which were surveyed for Don Manuel Rionda and below on the western side of the river by some lands which were surveyed by order of the alcalde of Nacogdoches for citizen Simon Sanches, beginning at the northeast corner of the upper league of said Sanchez, which is a white oak (encino blanco) of 30 inches in diameter, on the river-bank, west side, and is to the north seventy degrees forty minutes west six and three-fifth varas from an ash, and its the first corner of this measurement. From thence with Sanchez's upper line
167 to the south forty-five degrees west eleven thousand one hundred and eleven varas to the northwest corner of said Sanchez, which is a stake in an opening, and is the second corner of this measurement. From thence to the south forty-five degrees east two thousand five hundred varas with the side line of said Sanchez league, until arrival at the southwest corner of the same, which is a stake which bears south forty-eight degrees thirty minutes east nineteen varas from a Chinese oak (encine chino) twelve inches in diameter, and to the south thirty-one degrees east eleven varas from a hackberry (pala blanco) thirteen

neches in diameter, and is the third corner of this survey. Thence to the south forty-five degrees west nine thousand six hundred and one-third varas to a stake, which is the fourth corner of this measurement, and is bounded by vacant lands. From thence north forty-five degrees west seven thousand five hundred varas to another stake, which is the fifth corner of this measurement, and the first of the eleven leagues measured for Mr. Rionda. From thence to the north forty-five de-
168 grees east twenty thousand eight hundred and thirty-three varas and one-third came to river, where a tree was marked four inches in diameter, and bears north eighty-four degrees west from an ash six inches in diameter, and to the south fifty-six degrees east six varas from an ash five inches in diameter. These were marked at a hundred varas from the river. Crossing the river to the east side with thirty-six thousand seven hundred sixty-six and two-thirds varas arrived at the southeast corner of Mr. Rionda, and with forty thousand varas came to a stake, which is the sixth corner of this measurement, and is bounded by vacant lands. Thence south forty-five degrees east seven thousand five hundred varas to another stake, which is the seventh corner of this measurement, and is bounded by vacant lands. From thence south forty-five degrees west twenty-one thousand and six hundred and seventy-six and two thirds varas to a stake on the east bank of the river; this is the eighth corner and last of this measurement, and is bounded crossing the river across by the southeast corner of the upper league which was measured by order of the alcalde of this
169 town for Sanchez as already mentioned in these notes, and thence following the meanders of the river up-stream until completing in a straight line northwest two thousand five hundred varas came opposite the first corner crossing the river to said corner on the west bank, including in these limits eleven leagues of land, of which three leagues are of cultivatable (temporal) and the remaining eight leagues of grazing land (agostadeio,) and its shape is that shown in the map, which, by duplicate, I accompany to you.

Nacogdochez, November 23rd of 1833.

JOSÉ M. J. CARBAJAL.

Act to give the title.

NACOGDOCHES, *November* 25 of 1833.

The survey of the eleven leagues for the presbeter, José Ygnacio Aguilera, being completed, let the proper title be issued, and of the duplicate maps presented by the surveyor, citizen José Maria Carbajal, let one be attached to this original and another to the testimonio, both countersigning (subricodos) by me. I order this by this act with the accompanying witnesses according to law.

VICENTE ALDERETE.

Assisting: JUAN SANTOS.
Assisting: MANUEL PEREZ.

Title of possession.

Vicente Alderete, commissioned by the supreme government of
170 the State of Coahuila and Texas to give possession to various Mexicans of the lands which it has conceded to them in sale by the same supreme government in this department of Texas, as the presbiter, citizen Jose Ygnacio Aguilera, a native of the city of Mexico, has a concession from his excellency the governor of eleven leagues of

land, as purchaser, according to the superior decree of date of twenty-two of March of one thousand eight hundred and thirty, which by authenticated copy has been presented by his attorney, citizen Samuel Williams, a resident of the town of San Felipe of Austin, which copy heads this original, in name of the State I grant him, concede and put him in possession, ef'ective and personal, of eleven leagues of land on the right and left banks of the Trinity River, the boundaries of which are shown in the maps and field-notes made by the surveyor, citizen José Maria Carbajal, which originals are attached to this original of said grant. Three leagues belong to the class of cultivatable (temporal) and the eight remaining leagues to that of grazing, (agostadero,) according to which he must pay to the State the sum of one thousand two
171 hundred and fifty dollars in conformity with article twenty-fourth of the law of colonization of date twenty-fourth of March of eighteen hundred and twenty-five, according to the terms expressed by article twenty-two under the penalties there established, being duly named, that within one year from the date of this document he will construct corners of lime and stone on all the angles of his land; that he must settle and cultivate according to the terms of said law; that he will scrupulously comply with all it is ordered and that he will never transfer it to "monte main." Therefore, in use of the powers to me conceded in virtue of my commission by law and consequent instructions, I issue the present title and order that a testimonio may be drawn of all this original and be delivered to the party interested that he may pos'ess and enjoy as his own the eleven leagues which have been sold to him, for himself, his heirs, and successors, or whoever from him or them may rightfully succeed in law, for this is the will of the State. Given in the town of Nacogdoches, the twenty-sixth day of the month of November, of the year eighteen hundred and thirty-three, signed by me
172 with two assisting witnesses, according to law. I certify.

VICENTE ALDERETE.

Assisting: JOSÉ MARIA CHIRINO.
Assisting: JUAN SANTOS.

This testimonio agrees with its original, to which I refer, which remains in the archive of the commission under my charge, from which it was drawn by my order; it is written on four pages of paper of the corresponding seals; it is faithfully and legally copied, corrected, and co'pared, and I sign it with *true* assisting witnesses. Nacogdoches, twenty-first of January, of one thousand eight hundred and thirty-four. I certify.

VICENTE ALDERETE.

Assisting: SECUNDINO RODRIGUZ.
Assisting: MANL. PEREZ.

And along with the said Spanish documents the plaintiffs offered as evidence of its authentication for record the affidavit of R. D. Johnson, before E. P. Hunt, notary public of Galveston County, and the affidavit of Charles S. Taylor and Haden H. Edwards before W. F. Hyde, notary public of Nacogdoches County, followed by the certificates of the record of said document in the counties of Anderson and Freestone, which said affidavits and certificates are as follows, to wit:

173 First seal six dollars. For the years eighteen hundred and thirty-six and thirty-seven.

In the city of Mexico, on the twelfth of March of eighteen hundred and thirty-six, before me, a notary, and witnesses, appeared the bachelor (bachiller) Don José Ygnacio Aguilera, a resident to me well known, said that being indebted to Don Victor Massieu, a resident of this city and naturalized in this republic, of distinguished services, and being unable to compensate them according to his desires, he has determined to cede in benefit of his daughter, Dina Ana Matilda Massieu, infant of fifteen months old, the eleven leagues of land sold him by the State of Coahuila and Texas in Nacogdoches, as will appear in the testimonio which he delivers him, issued in said place on the twenty-first day of January, of eighteen hundred and thirty-four, by Don Vicente Alderete, com'is'ioned by the supreme government of that State to put Mexicans in possession of the lands conceded them in sale, acting with assisting witness, and so that it may hold I reduce it to a public instrument, which is the present, by which in the way which may be best ac-
174 cording to law, most firm and valid, he declares and confesses that he makes grace of and donation to the aforesaid Dina Ana Matilde Massieu of the above-mentioned eleven leagues under the limits which surround it and contain it, with all their appurtenances, purely, thoroughly, and perfectly irrevocably, called judicially amongst "living," for her heirs and successors, and do desists and gives the property and sovereignty which he has had to said leagues, and has and at once and renounces, transfers and passes to the said Dana Anna Matilda and her successors, and he gives her power and authority that of her own or judicially, as may suit her, she may enter into possession of the land, and whilst she so does he constitutes himself as her tenant, holden and precareous possession to answer her demand when called upon. He gives as accepted and as consum'ated this donation, and if it should exceed the five hundred (lueldos) of said excess, he makes her another donation as legitimately manifested, and renounces all the laws which refer to insinuations, (insinuaciens,) and those which say that donators which are venneuse or general shall not be valid,
175 and he binds himself not to revoke this instrument by his testament or codicil, nor by any other public or secret thought, or any might occur, the proper causes for revoking a donation, and should he revoke it, it should be invalid, and by that same act this may be approved and confirmed; and that she may immediately enjoy the possession he wants that the notary shal' deliver her a copy of this instrument of writing. To the compliance of which he binds his property, present and future, in due form and according to law. Don Victor Massieu their present, as father and guardian of Dona Matilde Massieu, to me well known, and being informed of the tenor of this writing he declares that in her name he expresses and declares that he accepts the donation therein contained, givin' at the time the most expres'ive thanks to the bachelor, (baciller,) Don José Ygnacio Aguilera. And they signed before the witnesses, Don Manairo Davilla, Don Teofilo Caneno, and Felipe de Revilla, of this city. I certify.

J. YGNACIO AGUILERA.
VICTOR MASSIEU.
MIGUEL DIEZ DE BONILLA.

It was copied from the original by the party interested in this sheet of the first seal of the current year, and agrees with the original. I certify.

MIGUEL DIEZ DE BONILLA.

176 No. 66.] CONSULATE OF THE UNITED STATES OF AMERICA,
Mexico, March 19, 1836.

I, the undersigned, consul of the United States of America, hereby certify that the signature of Migl. Diez de Benilla, affixed to the foregoing document, is well known to me, & that the said Bonilla was, at the time of executing the same, a duly-authorized notary public of this city, & that full faith and credit should be given to all his acts as such.

In testimony whereof I have hereunto set my hand and seal of office, in the city of Mexico, the day and year above written.

[SEAL.] (Signed) W. L. PARROTT.

Regestered at folios 35 & 36. Fees, $2.

And along with the said Spanish document the plaintiffs offered, as evidence of its authentication for record, the affidavits of R. D. Johnson before E. P. Hunt, notary public of Galveston County, and the affidavit of Charles S. Taylor and Haden H. Edwards before W. F. Hyde,
177 notary public of Nacogdoches County, followed by the certificates of the record of said document in the counties of Anderson and Freestone; which said affidavits and certificates are as follows, to wit:

STATE OF TEXAS,
Galveston County:

Personally came before me, E. P. Hunt, a notary public in and for the county of Galveston, in the State aforesaid, this 2nd day of May, 1857, R. D. Johnson, who, having been by me duly sworn according to law, deposes and says that the residence of Trandino Rodrigues & Manl. Perez, the witnesses to the annexed instrument, is unknown to him, said deponent.

Given under my hand and official seal the day and date aforesaid.

[L. S.] E. P. HUNT, *Notary Public.*

STATE OF TEXAS,
County of Nacogdoches:

Personally appeared before me, the undersigned authority, Charles S. Taylor and Haden H. Edwards, both of whom are to me well known, after being duly sworn, they each of them state on oath that they are acquainted with the handwriting of Vicente Aldrite, and that
178 the' believe the above to be his genuine signature, and that they have no interest in the foregoing copy of title.

To certify which I hereto sign my name and affix my seal of office, at Nacogdoches, on this 1st day of June, A. D. 1857.

[L. S.] WM. F. HYDE,
Notary Public, Nacogdoches County, Texas.

THE STATE OF TEXAS,
County of Anderson:

I, W. H. King, clerk of the district court in and for Anderson County, do hereby certify that the above and foregoing attached document of 11 leagues of land granted by the State of Coahuila & Texas to José Ygnacio Aguilera, and by him transferred to Ana Matilde Massieu, dated the 10th of March, A. D. 1836, together with its certificate of authentication, was filed in my office for record the 3rd day of October, A. D. 1870, at 11 o'clock a. m., and was duly recorded on the above-mentioned

day and finished on this day in book "N" of record of deeds, on pages 407, 408, 409, 410, 411, 412, 413, 414, and 415 thereof.

To certify which I hereunto set my hand and seal of office at Palestine this 7th day of October, A. D. 1870.

[L. S.]

W. H. KING,
Dist. Clk. A. Co.

Filed Feb. 4, 1875.

M. HOPKINS, *Clerk.*

179 STATE OF TEXAS,
County of Freestone:

I, A. G. Anderson, clerk of the district court in and for said county and State, duly qualified and commissioned in terms of the law, do hereby certify that the above foregoing attached document of 11 leagues of land granted by the State of Coahuila & Texas to José Yguacio Aguilera, and by him transferred to Ana Matilda Massieu, dated the 10th of March, A. D. 1836, together with its certificate of authentication, was filed in my office for record the 8th day of August, A. D. 1870, at 9 o'clock a. m., and was duly recorded on the above-mentioned day at 4 o'clock p. m. in book K, on pages 284, 285, 286, 287, 288, 289, 290, & 291.

In testimony whereof I have hereunto set my hand & seal of said county at office, in the town of Fairfield, in said county, this the day & year last above written.

[L. S.]

A. G. ANDERSON,
Clerk D. C. F. C., Texas.

180 The insertion of the Spanish original document is waived by the parties, but to the introduction of it, and its said appended affidavits and certificates, (as well as to the said translation,) the defendant objected, because the same was not authenticated for record in accordance with the laws of the State of Texas, in this, that the said affidavit of R. D. Johnson, of Galveston, does not show that he had any interest in the said document or land, or that he made any search or enquiry for the place or places of residences of the assisting witnesses to the said title of possession, or that he even knew their place of residence, and does not state that the said witnesses were dead at the time of his making said affidavit, nor that they resided out of the State of Texas; and also in this, that the said affidavit of Charles S. Taylor and H. H. Edwards does not state that they, or either of them, knew the handwriting of the assisting witnesses, Rodrigues and Perez, who subscribed the said testimony of the title of possession. But the court overruled the said objections of the defendant, and permitted the plaintiffs to read the said document and translation to the jury, and the defendant excepted to the ruling of the court in this behalf.

181 *Deft.'s 5th bill of exceptions.*

Next the plaintiffs offered in evidence a certain other document in Spanish, being the testimonio of an act of sale made by José Ignacio Aguilera, before Miguel Bonilla, notary public, and dated at the city of Mexico, March 10th, 1836, purporting to convey the aforesaid title to Anna Matilda Massieu, infant daughter of Victor Massieu, and Miguel Bonilla, in the presence of Don Marana Davilla, Don Teofilo Carena, and Don Felipe de Revilla, as witnesses; a translated copy of which

Spanish document was also offered by the plaintiffs, in words and figures as follows, to wit: "Translation. Donation from José Ygnacio Aguelera to Ana Matilda Massieu."

In words to wit:

In the city of Mexico, on the tenth March, eighteen hundred and thirty-six, before me, notary, and witnesses, the bach*rlter* Don José Ygnacio Aguilera, living in this city, to whom I give faith and with whom I am acquainted, said that being indebted to Don Victor Massieu, a resident of this capitol, and naturalized in this republic, for important services, and not being able to satisfy him for them as he wished, has thought proper to cede for the benefit of his daughter, Anna
182 Matilda Massieu, a child fifteen*th* months old, eleven sitios (leagues) of land sold to him by the government of the State of Coahuila and Texas, in Nacogdoches, as appears by the testimonio which is delivered to him, executed in the same place on the twenty-first January, eighteen hundred and thirty-four, by Don Vicente Aldsete, commissioned by the supreme government of said State to give possession to Mexicans who by sale have had lands granted to them, actuating as assisting witnesses; and in order that it may be evident to reduce it to a public instrument, which is the present writing, by which and in the manner and form which may be best in law and be firm and valid, declares and confesses that he gives and donates to the said Dona Ana Matilda Massieu the aforesaid eleven sitios (leagues) within the boundaries which surround and comprise them, with everything that belongs to them; this is a pure, real, perfect, and irrevocable donation which the law calls between living persons for her, her heirs and successors; and he desists and relinquishes the ownership of the property which he has had or may have of the aforesaid sitios, (leagues,) and henceforth he cedes, renounces, transfers, & passes them to the said Ana Ma-
183 tilda, and to her successors, and gives to her the power and faculty in order that with her own authority or judicially, as she may prefer, she may take and retain the hold and possession of them, and in the interim that she does so he constitutes himself as her tenant and precarious possession to assist her whenever she may require; he considers this donation as accepted, and received, and should it exceed the five hundred sueldos of such excess, he make another similar donation as being legitimately manifested, and renounces the laws which speak concerning such acceptances, and those which say that a large or general donation is not valid, and he obliges himself not to revoke this instrument by his will, codicil, *was* by any other public or secret act, although any of the reasons should occur for which donations may be revoked, and should he revoke it, it is not valid, and this donation remains by that act itself approved *are* revalidated, which he makes without any condition whatever; and in order that she may acquire immediate possession, he desires that the notary here present may deliver to her a copy of this instrument, to the fulfillment of which he obligates his present & future estate in the form and conformably
184 to law, and being present, Don Victoria Massieu, as father and tutor of Ana Matilda Massieu, who I also testify as knowing, being informed of the tenor of this instrument, declares that in her name he accepts the donation contained in it as mentioned, expressed, and declared, giving as he does give to the bachel*l*or Don José Ygnacio Aguilera the most expressive thanks, and they signed in the presence

of witnesses, Don Mariana Davila, Don Teofilo Carreno, and Don Filipe de Revilla, of this city. I testify.

J. YGNACIO AGUILERA,
VICTOR MASSIEU,
MIGUEL DIEZ DE BONILLA,
Notarial Notary.

Between lines—me—and hold—valid.

In connection with said Spanish document the plaintiffs offered a certificate of the consul-general of the United States at the city of Mexico, dated March 17th, 1836, and attached to said Spanish document; which certificate is in words and figures as follows, to wit:

No. 66.] CONSULATE OF THE UNITED STATES OF AMERICA,
Mexico, March 19, 1836.

I, the undersigned counsel of the United States of America, hereby certify that the signature of Mig'l Diez de Bonilla, affixed to the foregoing documents, is well known to me, & that the said Bonilla was at the time of executing the same a duly-authorized notary public of the
185 city, and that full faith & credit should be given to all his acts as such.

In testimony whereof I have hereunto set my hand and seal of office, in the city of Mexico, the day and year above written.

[SEAL.] (Signed) W. S. PARROTT.

Registered at folios 35 & 36. Fees, $2.

NOTE BY THE CLERK.—The bill of exceptions call for date, "March 17th, 1836." The original is March 19th, 1836.

And also in connection with said document and consular certificate, the plaintiffs offered the certificate of the record thereof in the counties of Anderson and Freestone in the State of Texas; which certificates of record are in words and figures as follows, to wit:

THE STATE OF TEXAS,
County of Anderson:

I, W. H. King, clerk of the district court in and for Anderson, County, do hereby certify that the above and foregoing attached document of 11 leagues of land granted by the State of Coahuila and Texas to José Ygnacio Aguilera, and by him transferred to Anna Matilda Massieu, dated the 10th of March, A. D. 1836, together with its certificate of authentication, was filed in my office for recor' the 3rd day of October, A. D. 1870, at 11 o'clock a. m., and was duly recorded on the
186 above-mentioned day and finished on this day in book N of record of deeds, on pages 407, 408, 409, 410, 411, 412, 413, 414, and 415 thereof.

To certify which I hereunto set my hand and seal of office at Palestine this 7th day of October, A. D. 1870.

W. H. KING,
Dist. Clk. A. Co.

STATE OF TEXAS,
County of Freestone:

I, A. G. Anderson, clerk of the district court in and for said county and State, duly qualified and commissioned in terms of the law, do

hereby certify that the above foregoing attached document of 11 leagues of land granted by the State of Coahuila and Texas to José Ygnacio Aguilera, and by him Ana Matilda Massieu, dated the 10th of March, A. D. 1836, together with its certificate of authentication, was filed in my office for record the 8th day of August, A. D. 1870, at 9 o'clock a. m., and was duly recorded on the above-mentioned day at 4 o'clock p. m. in book K, on pages 284, 285, 286, 287, 288, 289, 290, & 291.

In testimony whereof I have hereunto set my hand & seal of said court, at office, in the town of Fairfield, in said county, the day and year last above written.

[SEAL.]

A. G. ANDERSON,
Clerk D. C. F. C., Texas.

187 The insertion of the Spanish original is waived by the parties, but the defendant objected to the reading of the same and of the translation thereof and of the said consular certificate and the said certificates of record, because the said document was not authenticated for record in accordance with any law of the State of Texas or of the United States; which objection was overruled by the court, and the defendant excepted.

Deft.'s 6th bill of exceptions.

Thereupon the plaintiffs introduced as a witness E. A. Mexia, who being sworn, testified that he is and since A. D. 1870 has been, the agent for the plaintiffs in respect of the eleven leagues of land sued for; that in the year 1870 he was in the city of Mexico, and there examined the archives of the notary public, Miguel Bonilla, and among them was shown by said notary the original act of sale of said eleven leagues of land made by José Ignacio Aguilera to Anna Matilda Massieu and remaining on the notarial record of said notary, Bonilla; that witness (Mexia) was well acquainted with the handwriting of said José Ignacio
188 Aguilera, Victor Massieu, and said notary, Bonilla, whose several signatures appear to said original act of sale in said notary's archives; that their said several signatures were genuine, and that they are now all dead. Witness further stated that he demanded of the said notary the surrender of the said original act of sale, but it was refused by the said notary because the laws of Mexico did not allow him to part with said original papers, and because the act of sale was part of the permanent records of his office, and was preserved in a bound book along with other instruments, and could not lawfully or properly be severed therefrom; but witness stated that in the month of May, 1873, being again in the city of Mexico, and said Bonilla being then dead, witness called on the successor in office of said Bonilla, named Crecencio Langrave, who was the lawful custodian of the notarial records of said Bonilla; and witness was again shown the said original act of sale, and demanded the same from the said Langrave who refused it on the same grounds as those assigned by his predecessor Bonilla; that witness compared with said original act of sale the testimonio of the
189 same mentioned in defendant's 5th bill of exceptions, and found them to correspond; and witness also obtained from said notary Langrave a certified copy of said original act of sale, which copy witness, by comparison, found to correspond with said original, and which copy, being now here presented to witness by the plaintiffs' attorney, is by witness fully identified. On cross-examination, witness further stated that he knows nothing of or about Don Mariana Davilla, Don

Teofilo Carrena, or Don Felipe de Revilla, who are named as witnesses in said act of sale, and does not know whether they are living or dead; and further stated that he, the present witness, was not a witness to said act of sale, nor present when the same was executed. Defendant thereupon objected to the said testimony of said witness Mexia, and to the introduction of said testimonio of said act of sale, and also of said examined copy of said act of sale, because it is not shown that the several witnesses named in the said act of sale are dead, nor that they or some of them could not be found, to prove the execution of said original act of sale; and because the non-production of said original act of
190 sale is not and cannot be accounted for by parol proof of the laws of Mexico respecting the custody or retention there of said act of sale; which objections were overruled by the court, and the said testimonio and said examined copy were permitted to go to the jury, to which ruling of the court the defendant excepted.

Deft.'s 7th bill of exceptions.

And afterwards, the defendant continuing the cross-examination of the witness Mexia, the witness stated that on the 10th day of March, 1836, (being the date of the act of sale by Aguilera to Anna Matilda Massieu,) the said José Ignacio Aguilera was a native-born citizen of the republic of Mexico, and as such lived until his death; that at the same date the said Victor Massieu, who was a Frenchman by birth, was a naturalized citizen of the republic of Mexico, and resided therein until the year 1850, when he brought his family to Louisiana, and there soon afterwards died, retaining his Mexican citizenship until that event; that on said 10th of March, 1836, the said Anna Matilda Massieu, who was the daughter of said Victor, and born a citizen of Mexico, was about the age of fifteen months, and that she continued to be a citizen of Mexico until her death, in the month of August,
191 1851. And afterwards G. L. Hammekin, a witness for the plaintiff, being cross-examined by the defendant, proved the said facts stated by the witness Mexia respecting the citizenship, and of said signatures, Aguilera, Victor Massieu, M. Bonilla, and there being no other evidence offered by plaintiff respecting such citizenship and signatures before they rested their case.

And thereupon the defendant moved the court to exclude from the jury all of the evidence offered or introduced by the plaintiffs for the purpose of proving the transfer or transmission of title, on said 10th of March, 1836, from said Aguilera to said Victor Massieu, or to said Anna Matilda Massieu; the said motion to exclude being based upon the ground that on said 10th of March, 1836, there was a state of flagrant war existing between the republic of Mexico and the republic of Texas; that, therefore, there could at that date have been no livery of seizen in fact, or no actual transmission of possession of the lands sued for, as between the said parties to the act of sale, and therefore could not have been any constructive seizen or possession transmitted by said act of sale, and the same was wholly inoperative to transfer title to the lands in controversy. But the court overruled said motion of the defendant, who thereupon duly excepted.

192 *Def't's 8th bill of exceptions.*

Thereupon the plaintiffs offered a certain document in the Spanish language purporting to be a copy of the said original act of sale by said

Aguilera to said Anna Matilda Massieu, and attached to which were affidavits in English made before the consul-general of the United States at the city of Mexico on the 14th day of May, 1873, by Crecencio Langrave, Anastacio Zercero, and Joaquin Morena; and in connection with which Spanish document the plaintiff offered an English translation of the same. The parties waive the insertion of the said document in Spanish and also of the insertion of the English translation of the same, because it is substantially the same as that set forth in defendant's 5th bill of exceptions, to which reference may be had; but the said affidavits attached to the said Spanish documents are in the words and figures following, to wit:

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA,
Mexico City, May 14th, 1873.

Before me, Julius A. Shelton, consul-general of the United States of America at Mexico City, republic of Mexico, appeared this day in this consulate-general Cresencio Langrave, known to me, and known
193 to me to be the person named, who, having duly protested according to the laws of Mexico that he would state the truth, the whole truth, and nothing but the truth, deposed and said that he is forty-nine years of age, married, and that he resides in the city of Mexico; that he is, as he is known to me to be, a notary public now in the exercise of the functions of such office in this city, & who has exercised the duties of said office since the year 1848; that he is the official custodian of the archives (protocol) of the notary public, Miguel Diez de Bonella, now deceased, by virtue of his legal appointment by the common counsel of this city of Mexico, and a legal and formal delivered of said archives to said Langrave on the 27th day of October of the year 1871. Who also protested that he had no interest directly or indirectly in the matter in behalf of which his deposition is taken; that he was very well acquainted with Miguel Diez de Bonella during his life-time, and that he has often seen him sign his name and knows his signature; that he recognizes the signature of the said Miguel Diez de Bonella subscribed as notary public to the deed of transfer of eleven leagues of land to be genuine, as found in the original protocol (archives) of the notary public, Mi-
194 guel Diez de Bonella, now deceased, corresponding to the year 1836, which original proctocol (archives) are now by him presented before me in this consulate-general, of which the foregoing writing is declared by said Cresencio Langrave to be a true copy, the said copy of the transfer of the said land having been as the witness declared carefully compared by him, the witness, with the original in said protocol word for word and number for number; and he further declared, as is well known to this consulate, that the original protocol (archives) presented in this consulate this day, like all protocols from the original records of this county, and therefore cannot be removed from the immediate custody of the notary public legally in charge of them.

CRESENO. LANDGRAVE,
Not. Pub.

Before me, Julius A. Shelton, consul-general of the United States of America at Mexico City, personally appeared Anastacio Zerecro, known to me and known to be the person described in this deposition, who, having first duly protested in conformity with the laws of Mexico that he would state the truth, the whole truth, and nothing but the truth, deposed and said that he is 74 years of age, married, and a resi-
195 dent of this city, and is a judge of the superior tribunal of Mexico;

that he has no interest, directly or indirectly, in the matter in behalf of which he made this deposition; that he has examined the original protocol marked (P) presented in this consulate by Crescencio Landgrave, a notary public, from which the foregoing true copy was taken, the same having been compared by him; that he knew personally during his life José Ignacio Aguilera, has seen him sign his name often, and knew his signature, & that the signature as found in said protocol on page "9, over," is the original, true, and genuine signature of the said José Ignacio Aguilera.

A. ZERECERO.

Before me, Julius R. Skilton, consul-general of the United States of America for and at the city of Mexico, personally appeared Joaquin Moreno, to me personally known and known to be the person described in and who makes this deposition, who, having first duly protested in accordance with the laws of Mexico that he would state the truth, the whole truth, and nothing but the truth, deposed and said that he was 64 years of age, married, and a resident of Mexico City; was employed
196 in the treasury department of the republic Mexico, and that he had no interest, past, present, or prospective, in the matter in support of which he gave his testimony; that he had examined the original protocol marked (P) presented in this consulate by Crescencio Landgrave, a notary public of this city, from which the foregoing is a true copy, the same having been compared by him; that he knew personally José Ignacio Aguilera during his life; had seen him often sign his name and knew his signature, and that the signature as found in the said protocol (archives) is the original, true, and genuine signature of the said Jose Ignacio Aguilera.

JOAQUIN MORENA.

And I, Julius A. Skilton, certify that I am consul-general of the United States of America at Mexico City; tha' Crescencio Landgrave, Anastacio Zerecero, and Joaquin Moreno, whose names appear subscribed respectively to the foregoing depositions, did respectively make the said depositions to which their names are respectively signed; that the said depositions were reduced to writing in my presence; that the deposition of Crescencio Landgrave was translated and read to him in
197 Spanish by George S. Skilton, who protests and says that he is capable of translating from English into Spanish, and that he correctly translated the said deposition of the said Landgrave; that Anastacio Zenecero and Joaquin Moreno protested and said that they read and understand English, and the said Zerenco & Moreno read in my presence the depositions by them respectively signed. Whereupon they declared the said respective depositions to be true, and subscribed the same respectively in my presence.

Witness my hand & seal of this consulate, this 14 day of May, A. D. 1873.

[L. S.] JULIUS A. SKILTON,
U. S. Consul, Seal.

No. 64.

Defendant thereupon objected to the admission of said document, translation, and affidavits, 1st. Because they were not filed in this court three days before the commencement of the trial of this cause, nor was

the defendant notified of the same before they are here offered in evidence. 2nd. Because the same were not filed in this court one day before this trial commenced. 3rd. Because the said affidavits were and are mere ex-parte affidavits, made without the knowledge of the defendant, and not taken by virtue of any commission issued from this
198 court nor by the authority of any law of the State of Texas or of the United States, so as to furnish any legal evidence in this cause of the correctness of the said copy. Which objections were overruled by the court and the said document and translation allowed to go to the jury; to which the defendant duly excepted.

199 *Def't's 9th bill of exceptions.*

The plaintiffs having rested their cause, the defendant, for the purpose of deraigning title to himself to the land claimed in his pleadings, introduced—

1st. An orig'nal testimonio of a grant of one league of land, dated June 26th, 1835, from the government of Coahuila and Texas to Edward C. Harris, and which embraces 1,855 of the 2,008 acres claimed by defendant; which testimonio was recorded in the county of Anderson, in which said league is situate, on September 29th, 1852, and in Houston County on the 19th of March, 1838.

2nd. Deed from said Edward C. Harris to Lester Hotchkiss, date June 9th, 1840, purporting to convey the said league of land, and recorded in Houston County on 24th of June, 1840, and in Anderson County September 29th, 1852.

3rd. Deed from said Hotchkiss to Daniel H. Vail, dated April 24th, 1844, purporting to convey the same league of land, and recorded in Houston County May 10th, 1844, and in Anderson County September 29th, 1852.

4th. Deed from said Vail and his wife, Isabella, to R. M. Mynott and his wife, Elizabeth, dated June 1st, 1855, purporting to convey said league of land, and recorded in Anderson County April 10th, 1856.

200 5th. Bond for title made by said R. M. Mynett to Thomas G. Kimbrough for 1,845 acres of the said Harris league and now claimed by defendant, which bond was recorded in said county of Anderson on the 13th of June, 1855.

6th. Deed from said R. M. and Elizabeth Mynett to said Thomas G. Kimbrough, dated October 30th, 1856, purporting to convey said 1,845 acres and recorded in Anderson County November 14th, 1856.

7th. Deed from Thomas G. Kimbrough to E. M. Dunn and C. H. Airhart, this defendant, dated November 30th, 1868, purporting to convey the said 1,845 acres, and recorded in Anderson County April 23rd, 1869.

Next the defendant offered in evidence, as a recorded instrument and without proof of its execution, a deed from said E. M. Dunn and his wife, Ann, to this defendant, dated November 3rd, 1869, purporting to convey the interest of the said grantors in said 1,845 acres, and also their interest in 153 acres of the R. S. Patton ⅔ of a league and labor, and with which deed was offered a certificate of the authentication of said deed before and by John H. Morrison, county judge of Anderson*t* coun*t*', dated November 26th, 1869, and also with which deed was offered a
201 certificate on said deed of the record thereof in Anderson County, on December 27th, 1869, by W. H. King, county clerk.

To the admission of which last-mentioned deed the plaintiffs objected that the revenue-stamps affixed on said deed had never been cancelled, and

that therefore the record of said deed was contrary to law and void, and said deed was not admissible as a recorded instrument; which objection was sustained by the court and the said deed excluded, and thereupon the defendant duly excepted. "But the court charged the jury that the defendant, having introduced evidence tending to show that he was the owner of the undivided half of said 1,845 acres, part of the Ed. C. Harris league, by virtue of the said deed from Kimbrough to said defendant and said E. M. Dunn, he, the said defendant, was in all respects, so far as this suit was concerned, in as good a plight as if he had shown a conveyance to himself by said Dunn of the other undivided half of said land."

NOTE.—From the word "But," on the 11th line, to "said land," by the court.

Def't's 10th bill of exceptions.

Next the defendant, for the purpose of deraigning his title to that portion (153 acres) of land in controversy, which is part of the Patton headright, introduced and read a certified copy from the general
202 land-office of the State of Texas of patent No. 357, volume 11, issued on the 25th of November, 1854, to Robert S. Patton for ⅓ of a league and labor of land, comprising said 153 acres.

Next defendant introduced deed from said R. S. Patton to Thomas G. Kimbrough, dated December 30th, 1854, purporting to convey all of the land described in said patent, and recorded in Anderson County on the 1st of January, 1855.

Next defendant introduced a certified copy from said general land-office of patent No. 682, volume 12, issued February 4th, 1857, to said Robert S. Patton, for 10 and a fraction labors of land comprising said 153 acres, and such other part of said ⅓ of a league and labor as was not in conflict with said Edward C. Harris' league. And then the defendant offered in evidence a deed from said T. G. Kimbrough to E. M. Dunn and this defendant, dated February 1st, 1869, purporting to convey said 153 acres, which deed was offered, together with the authentication of the same, for record before W. H. King, clerk of the county court of Anderson County, on 12th day of March, 1869, and to-
203 gether with the said clerk's certificate of the record of said deed dated the 13th of May, 1869; when the plaintiffs objected to the admission of said deed and certificates, because the internal revenue stamps affixed to said deed had never been cancelled; and the court sustained the said exception and ruled out the said deed and certificates, to which the defendant excepted; and thereupon the plaintiffs moved the court to exclude from the jury all the patents and other muniments of defendants' title mentioned in this bill of exceptions, which motion was sustained by the court and said documents excluded; to which the defendant excepted.

Def't's 11th bill of exception.

Thereupon the defendant introduced the witness D. V. Whiting, who, being sworn, stated that he is the Spanish translator in the general land-office of the State of Texas, and the custodian of the Spanish archives belonging thereto; and the witness produced the protocol, or original title of the grant of eleven leagues of land made by the State of Coahuila and Texas to José Ignacio Aguilera, and stated that the endorsements thereon, made by the predecessor in office of the

witness, showed that the said protocol was deposited among said Spanish archives on the 14th day of July, 1873, by C. A. Mexia, and that there was nothing on said protocol or elsewhere in said translator's office to show that said protocol had ever been in said office prior to said 14th of July, 1873.

On cross-examination by plaintiffs, witness stated that the signature of Vicente Alderete, special commissioner, resembles and appears to be the same handwriting as numerous other signatures recognized in the general land-office as genuine signatures of such special commissioner Alderete.

Defendant then introduced E. A. Mexia, who testified that he procured said protocol in June or July, 1873, from the governor of the State of Coahuila in the republic of Mexico; and that witness deposited the same in the general land office of the State of Texas some time in the month of July, 1873; and there being no other evidence conflicting with said testimony as to the date when said protocol was deposited in said general land office, the defendant moved the court to exclude as evidence to the jury the certified copy from said land-
205 office of said protocol, and read by the plaintiffs, because the said protocol was not an archive of the general land-office of the State of Texas, but was an archive of the Mexican State of Coahuila, and was put in said general land-office by a private individual and without the authority or sanction of any law, and that there is no law of the State of Texas or of the United States authorizing the use of a copy thereof as evidence in any court or judicial proceeding; which motion was overruled by the court, and defendant excepted.

Def't's 12th bill of exceptions.

The deft. offered to prove by one of the subscribing witnesses thereto a deed from Thos. G. Kimbrough to E. M. Airhart & deft., conveying one hundred and fifty-three acres, part of the Robert S. Patton headright survey, bearing date Feb'y 1st, 1869, & having affixed thereto the proper internal revenue-stamps, but which had not cancelled by Thos. G. Kimbrough or any other person; the deft. offering in open court to cancel said stamp, when the plffs. objected to the proving of said deed as evidence by the subscribing witnesses upon the
206 ground that said deed was not admissable in evidence, because the maker had not cancelled said revenue-stamp at the date of execution of said deed, and that no other person was authorized to cancel said revenue-stamp except the maker; which objections were sustained by the court, and the deft., by his attorneys, excepted.

Def't's 13th bill of exceptions.

And the plaintiffs and defendant having closed their evidence to the jury, the defendant asked the court to instruct the jury on the question of ailenage as affecting the title of plaintiffs, as follows:

In United States circuit court, Austin, Texas.

UNITED STATES OF AMERICA,
State of Texas, Western District of Texas:

ANNA R. DE MASSIEU ET AL.
vs.
H. C. AIRHART. } No. 1283.

The defendant, by his attorneys, ask' the court to charge the jury—
1st. That if the proof shows that the plaintiffs claim the land sued

for by inheritance from and as heirs of Anna Matilda de Massieu, and that she died in the month of August, 1851, or in the year A. D.
207 1851, and that the said Anna Matilda was at that time a citizen of the republic of Mexico and an alien to the State of Texas and to the United States of America; and that said plaintiffs were at the date of her death citizens of the republic of Mexico and aliens to the State of Texas and to the United States of America; and if the proof further shows that said plaintiffs did not become citizens of the State of Texas or of the United States of America and take possession of said land in nine years from the date of the death of said Anna Matilda, then the plaintiffs have no title to the land sued for, and you should find for the defendant.

2nd. That if the proof shows that the plaintiffs claim the land sued for by inheritance from, and as the heirs of, Anna Matilda de Massieu, and that at the date of the death of the said Anna Matilda she was a citizen of the republic of Mexico and an alien to the State of Texas and to the United States of America, and that at the date of the death of the said Anna Matilda these plaintiffs were also citizens of the
208 republic of Mexico, and alien to the State of Texas and to the United States of America, then the said Anna Matilda de Massieu, as such alien, had no inheritable blood, and the title to said land could not pass by inheritance from her to plaintiffs, and such aliens took no title to said land by inheritance from her, and you should find for the defendant; and for the evidence in the case pertinent the said charges requested by defendant, reference is hereby made to the 4th, 5th, 6th, and 7th of these bills of exceptions taken by this defendant; but the court refused to give to the jury the said charges requested by the defendant, who then and there duly excepted.

Def't's 14th bill of exceptions.

Next the defendant asked the court to instruct the jury as to the pretended act of sale of date March 10th, 1836, by José Ignacio Aguilera to Anna Matilda Massieu, as follows:

3d. That if the act of conveyance of the land sued for was made by José Ygnacio Aguilera to Anna Matilda de Massieu, in the republic of Mexico, on the 10th day of *Mexico*, 1836, and if at that time the
209 said Aguilera and the said Massieu were citizens of said republic of Mexico, and aliens to the republic of Texas, and if the republic of Mexico and the republic of Texas and their people were then at open war with each other, (and of this fact the courts and juries of the country will take notice from the public history of the country,) and if at the time of said sale said Aguilera did not deliver the actual possession of said land to said Massieu, then we charge you that under these facts there could have been no 'livery of seizen and no constructive delivery of the pos'ession of same, and that said act of sale was inoperative and void, and did not transfer the title to said land from said Aguilera to said Massieu, and you should find for the defendant.

For the evidence in the case pertinent to said 3rd requested charge, reference is here made to the 5th, 6th, and 7th of these bills of exception taken by this defendant; but the court refused to give to the jury the said 3rd charge requested by the defendant, who then and there duly excepted.

Def't's 15th bill of exceptions.

The defendant then, on the question of his own title and of notice and

innocent purchaser under the laws of the State of Texas, asked
210 the court to instruct the jury as follows:

4th. If the proof shows that the original title of the plaintiffs to the land in controversy was not in file in or among the archives of the general land-office of the State of Texas, and that the testimonio of said title was not duly recorded in Anderson or Freestone Counties, and that the survey of said plaintiffs was not plotted on the map of Anderson County, kept in the office of the county surveyor of said county, or in the general land-office of the State of Texas, by virtue of a title on file authorizing the same to be so plot'ed, and that the defendant had no actual notice of the existence of the title of plaintiffs to said land, and that the defendant had no such other notice, should have paid a prudent man, upon reasonable enquiry, as to the existence of plaintiffs' title, and as would have enabled him, upon such enquiry, to ascertain the existence of the title of plaintiffs at the date or dates upon which the defendant acquired his title or titles to the land he claims, then he is an innocent purchaser without notice, and you should find for him. And we further charge you that if any or all of
211 the persons under, by, or through whom the defendant acquired his title to said land acquired the same as an innocent purchaser or purchasers without notice, as defined in the foregoing charge, then such title or titles ensured to the benefit of this defendant, and you should find for him.

5th. The sketch on which is marked a plat of the Aguilera and other grants, produced from the general land-office, and a copy of which is in evidence before you, is not constructive notice to the defendant, and was not constructive notice to those under, by, and through whom he derived his titles of the existence of the grant to plaintiffs, unless the evidence shows further that it was identified and plotted on the public and official maps in the general land-office, so as to show the connexion of the surveys represented on it with the lands adjacent to it, and the locality and identity of the lands claimed by plaintiffs; and unless the proof shows also that said sketch represented a survey of land for which there was a known and valid survey or title in the general land-office. And it is not evidence of actual notice for any purpose
212 unless it is shown by the proof that the defendant knew of its existence.

6th. That the translated copy of a list or abstract of citios (leagues) and labors of land granted by the government of Coahuila and Texas, &c., certified by the Spanish translator and commissioner of the general land-office, which has been allowed to go in evidence before you, subject to the charge of the court, is not evidence of constructive notice to the defendant of the existence of the grant of land claimed by plaintiffs, unless you believe from the evidence, dates, &c., that the Ygnatio Aguilera grant therein referred to is the grant claimed by plaintiffs in this suit, and unless you also believe that the grant therein referred to was on file in the general land-office before the defendant acquired his title to the land in controversy.

There was no evidence that the defendant, or any of those through whom he deraigns title, had any actual notice at the times they respectively acquired their titles of the existence of the said grant to José Ignacio Aguilera, under which the plaintiffs derive their pretended title.

For the evidence of the defendant's title, reference is here made
213 to the 9th and 10th foregoing bills of exceptions. The plaintiffs, for the purpose of fixing constructive notice upon the defendant and those under or through whom he deraigns his title, introduced a certified copy from the general land-office of a certain abstract in the

Spanish language, of sitios (leagues) and labors granted by the Government previous to the date of said abstract, (June 11th, 1830;) and in connection with said copy in Spanish the plaintiffs also introduced an English translation of the same, certified from the general land-office, and which is in words and figures as follows:

Abstracts of sitios (leagues) and labors granted up to this date by the government to several individuals, by way of purchase, the original documents whereof remain on file in these archives, and the parties interested furnished with the respective testimonio (certified copy) for such purposes as may be expedient:

		Date of grant.	Leagues.	Labors.
	To Captain Citizen José Maria Fuenter	October 1st, 1828	011	
	To Lieut. Governor Citizen Victor Blanco	....do....25 .. do	011	
	To Citizen José Miguel Murguiz	....do....do .. do	011	
	To Citizens Justa Pepi & José de Jesus Grande	....do....30 .. do	006	
214	To Citizen Pedro Pereyra Jesus Muriado Grande	November 19, 1828	011	
	To Citizen Justo Lienda	....do....20 .. do	011	
	To Citizen Miguel Rabage (of the Risa)	December 2 ... do	011	
	To Citizen Ignacio Sendeja & Justo Pepi	....do....2 ... do	017	
	To Citizen José Manuel del Moral	....do....10 .. do	008	
	To Citizen Joaquin Fernandez de Rumeyor	....do....do .. do	002	
	To Citizen Alberto Gintrerrez	....do....do .. do	004	
	To Citizen Juan Antonio Padella	....do....do .. do	011	
	To Citizen José Ma de la Garza (of N. Leon)	January 9, 1829	011	
	To Citizen Pedro Trevino (of N. Leon)	....do....9 ... do	011	
	To Citizen Rafael Mancholu (of Bexar)	February 13, 1829	002	
	To Citizen Pedro Galinda, in the name of his father, Citizen Juan Galindo	March 14, 1829	011	
	To Citizen Roman de la Garza	December 8 ... do	011	
	To Citizen Pedro Valdez (of Monclova)	....do....8 ... do	011	
	To Citizen Santiago Hervetson	....do....24 .. do	011	
	To Citizen Santiago Power	December 24, 1829	011	
	To Citizen Vicente Padilla	February 5, 1830	011	
	To Citizen José Antonio Navarro	....do....5 ... do	007	
	To Citizen Pedro Varela	....do....12 ... do	011	
	To Atty. at Law Citizen Juan Vicente Campos	March 8, 1830	011	
	To Citizen Agustin Viesca	....do....do .. do	011	
	To Dona Maria de la Concepcion Marquez	....do....do .. do	011	
	To Citizen Juan Luis Chabert	....do....do .. do	011	
	To Citizen Andres Varela	February 12, 1830	011	
	To Citizen Juan Neponurcerro Aevsta	March 8th, 1830	011	
215	To Citizen Joaquin Fernandez de Rurneryon	March 11, 1830	009	
	To Citizen Juan Rodriguez	....do....18 .. do	011	
	To Citizen Joaquin Morena	....do....do .. do	011	
	To Citizen J. Ygnacio Aguilera	....do....22 .. do	011	
	To Citizen Fernando del Valle	....do....do .. do	011	
	To Citizen Manuel Crecencio Rejon	....do....do .. do	011	
	To Citizen José Stavoli	....do....29 .. do	011	
	To Citizen Mariano Riva Palucios	April 15, 1830	011	
	To Citizen Antonio Menchaca	May 19 .. do	011	
	To Citizen Pedro Zarza	....do....21 .. do	011	
	To Citizen Brigr. Joaquin Meir (of N. Leon)	June 3, 1830	011	

* * * * * * *
* * * * * * *

Leona Vicaria, June 11th, 1830.
(Signed) SANTIAGO DEL VALLE,
Sec'y.

GENERAL LAND-OFFICE,
TRANSLATOR'S DEPARTMENT,
Austin, August 11th, 1874.

I certify the foregoing to be a correct translation from the original Spanish, of what purports to be an abstract of grants of sitios (leagues) and labors granted by the government of Coahuila and Texas to individuals therein named, as contained in file 52 of Empresarios' contracts, pages 2 & 3, of the permanent records of this office.

DAVID V. WHITING,
Spanish Translator.

216

STATE OF TEXAS,
GENERAL LAND-OFFICE,
Austin, August 11th, 1874.

I, J. J. Gross, commissioner of the general land-office of the State of Texas, do hereby certify that David V. Whiting, whose genuine signature is attached to the foregoing certificate, is the Spanish translator of this office, duly qualified according to law, and that his official acts as such translator are entitled to full faith and credit.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land-office to be stamped, on the day and date last above written.

[SEAL.]

J. J. GROSS,
Commissioner.

The parties waive the insertion of the copy in the Spanish language. The plaintiffs, for the same purpose, introduced as a witness C. Pressler, who, being sworn, testified that he is, and since the year 1846, except two years, has been, a draughtsman in the general land-office of the State of Texas; that the oldest map of the Houston land-district
217 to be found in the said office was made in 1841; that neither the José Ignacio Aguilera grant nor the E. C. Harris league appear or are delineated on that map. The witness then exhibited a land-office book of sketches, and states that the sketches were bound up in 1847 or 1848, on one of which sketches the José Ignacio Aguilera seven-league grant is shown, and a copy of which sketch, certified by the land office, is here shown.

[Here follows map marked page 217.]

218 Witness does not know how long this sketch has been in the land-office, but states that it purports to have been made by a Spaniard or Mexico named Caravajal, whose handwriting, however, is not known to witness. Further the witness stated that said Aguilera grant was not placed or delineated on any official or recognized map in the said general land-office until the year 1855, when a plat of said grant taken from the above-mentioned sketch was traced upon the official and recognized maps of said land-office, but was traced in lines of a different color from the lines of the mapped surveys recognized as titled lands, and was thus traced and colored because there was no title or other evidence in said land-office that it was granted lands; and that this was not done until the year 1855, at which time the location and identification on the maps of the Riondo Palacios and Acosta grants (lying above the Aguilera on the Trinity River) was made. The witness further stated that subsequent as well as prior to said year 1855 and down to the
219 14th day of July, 1873, when the Aguilera title was first depos-

ited in the general land-office, the general land-office regarded and treated the lands which now appear to be covered by the Aguilera grant as vacant land, and continued to approve surveys thereon and to issue patents on the same.

Witness further testified that previous to July 14th, 1873, when plaintiffs filed the Aguilera title in the general land-office, titles or patents were issued by the former government of Coahuila and Texas, and by the general land-office of Texas, for lands which appear by the maps to be wholly or in part within the boundaries of said Aguilera grant, to wit, to Edward C. Harris for one league of land granted June 26th, 1835; to A. G. Monroe for one league granted September 18th, 1835; to Isaac Barnett for one league granted October 16th, 1835. The following-named have been surveyed and patented under the authority of the republic and State of Texas, to wit: To Jefferson Adams, Darius H. Edens, Manuel N. Ybarba, R. S. Patton, Robert Kenedy, F. S. Whitesides, R. Bowen, J. R. Gatewood, J. L. Rountree, J. B. Hanks, Robert Earl, John Edwards, Jane Cuthbertson, J. N. Wright, C. C. Stib-
220 bings, two surveys; E. Cone, J. S. Wray, R. Kennedy, San Antonio and Mexican Gulf Railroad Company, N. D. Alcock, T. N. Hendricks, B. Allen; all of which surveys are wholly or partly within that part of Aguilera grant which lies east of the Trinity River and within Anderson County, and which surveys cover nearly the entire area of that part of said grant.

Said witness also testified that the following-named surveys lying wholly or partly within that portion of said grant which lies west of the Trinity River and in Freestone County were patented by the republic and State of Texas previous to said 14th of July, 1873, to wit: Tobias Dubromer, Thomas Gaston, R. Fearing, Lucinda Tignon, J. W. Little, Eli Shinley, J. C. Cloud, Thomas Heath, C. G. Burkle, John S. Wells, R. P. Brown, and F. Smiex; and witness further stated that it appears that a number of other surveys and locations have been made within said portion of said grant, but not patented; surveys cover most of said portion of said Aguilera grant. E. A. Mexia, witness for plaintiff, testified that he had seen landmarks of the south boundary of the
221 Aguilera survey on the west bank of the Trinity River and within Freestone County, and had also seen landmarks at one other place on said south bound'ry west of the Trinity River and within Freestone County, but had never seen any other landmarks of the survey besides those above named. On cross-examination this witness stated that said two landmarks seen by him were on the north boundary-line of the first league of the Surion Sanchez eleven-league grant.

On re-examination the witness stated that the handwriting on the "sketch" exhibited by the witness Pressler is the handwriting of the said Carabajal, with whom and with whose handwriting witness was well acquainted previous to the death of said Carabajal, the witness having served under said Carabajal in the military service of Mexico. The above was all of the evidence relevant to the said 4th, 5th, and 6th charges requested by the defendant.

But the court refused to give the said 4th, 5th, and 6th charges to the jury, the court assigning as the reason for refusing said 5th charge
that it was "rendered inappropriate by instructions given;" and
222 for refusing said 6th charge, that it was "rendered inappropriate by other instructions given;" and to the said ruling of the court refusing said instructions, the defendant then and there duly excepted.

Deft.'s 16th bill of exceptions.

The defendant then, on the question of three-years' limitation, asked the court to instruct the jury as follows:

7th. If you find, upon the evidence, that the defendant has been in the peaceable, uninterrupted, and adverse possession of the land in controversy for three years next preceding the institution of this suit, not including the period of minority of the defendants and the time during which the statute of limitation was suspended by law, from the 28th of January, 1861, to the 30th of March, 1870, under a legal title, and by a regular chain of title from and under the sovereignty of the soil, then you should find for the defendant. And if you find from the proof that under the foregoing part of this charge the right of a part of the plaintiffs is barred, and that the right of a part of them is not barred, then you cannot in this suit find for those whose right is not barred,

223 and should find for the defendant. The evidence on which said charge was requested was as follows: E. A. Mexia, testifying for the plaintiffs, stated that said Anna Matilda Massieu died at St. Louis, Missouri, in the month of August, 1851, being about sixteen years of age, and unmarried at the time of her death; that on the 10th of March, 1836, (the date of Aguilera's act of sale to her,) she was fifteen months old; that her father, Victor Massieu, died in the year 1849 or 1850; that Anna Redding Massieu, one of the plaintiffs in this suit, was about 16 years old in the year 1834, when she married said Victor, and is the mother of said Anna Matilda, and has remained a widow ever since the death of her husband, Victor Massieu, in 1849 or 1850; that the other plaintiffs are the two brothers and two sisters of the said Anna Matilda, all four of whom were minors, under twenty-one years of age, at the date of the death of said Anna Matilda. Witness was not certain whether the youngest of said brothers and sisters of said Anna Matilda was born before the death of its father, said Victor Massieu, or shortly after that event, but stated that they were all younger than said Anna

224 Matilda, and that there was an interval of two or three years between their respective births.

G. L. Hammekin, plaintiffs' witness, testified respecting the ages of said plaintiffs to the same effect as the said Mexia, and there was no other evidence on the subject. Defendant proved by Jacob Crisp, W. G. W. Jowers, and W. Reader, that Thos. G. Kimbrough, one of the persons under and through whom defendant derives his title to the 1,855 acres, part of said Edward C. Harris league, and part of the land in suit, settled upon the said 1,855 acres in the fall of the year 1854, and opened and enclosed between 250 and 300 acres that same year, and that since such settlement by said Kimbrough, in the year 1854, the said 1,855 acres have been continuously and uninterruptedly occupied and the enclosed land cultivated by said Kimbrough and those deriving title under him, down to the present time.

The plaintiffs' petition in this cause was filed in this court on the 3rd day of June, 1872; and there was no further evidence relevant to the said 7th charge requested by the defendant.

225 And the court gave in charge to the jury the first paragraph or clause of said requested charge, but refused to give the second or concluding clause thereof, which is as follows:

"And if you find from the proof that under the foregoing part of this charge the right of a part the plaintiffs is barred, and that the right of a part of them is not barred, then you cannot in this suit find for those whose right is not barred, and should find for the defendant."

To which ruling of the court in refusing to give said concluding clause the defendant then and there duly excepted.

Deft.'s 17th bill of exceptions.

And the court then proceeded to give its own instructions to the jury, among which are the following instructions to the effect that under the law and facts of this cause the junior title claimed by the defendant, even if it originated without notice of the senior title relied on by the plaintiffs, and was transmitted to and by each successive holder thereof down to the defendant, without such notice and in good faith, is not a superior title to the said 1,855 acres on the Harris league to the title relied on by the plaintiffs, to wit:

226 The next defence is in substance as follows: That although the grant under which plaintiffs claim is older than the title under which defendant claims, yet the plaintiff neglected to register their title, and the defendant acquired his title in good faith, and without notice or knowledge of the title which plaintiffs claim, therefore the plaintiffs' title is postponed to the title of defendant, which by reason of the neglect of the plaintiffs to register their title and of the good faith of defendant in acquiring his title became the superior and better title. This defence, even if it were a good one, can only apply to the Harris tract, for that is the only part of the lands in controversy to which defendant shows any title in himself. But we instruct you that under the proof in this case this defense is not good as to any part of the land.

It is in evidence that both the title of plaintiffs and the title of defendant originated while Texas was a part of Mexico, and subject to the laws before the declaration of Texan independence, and before the adoption of the plan and powers of the present government of Texas.

227 In a word, they are both titles eminating from the Mexican government. If you find these facts to be true, we are of opinion, and so instruct you, that under this state of facts the junior, which is the defendant's, is not entitled to any advantage for the want of registration of the said title to the plaintiffs. In other words, the fact that the plaintiffs failed to register their title, and that defendant acquired his in good faith and without notice of plaintiffs' title, constitutes no defence to this action. If all the foregoing defences shall, in your opinion, not be established, you will consider the defendant's claim to the value of his improvements.

To which portion of the said instructions and to the several matters of law thereby given in charge to the jury the defendant then and there duly excepted. (Defendant here protests that by omitting to take bills of exception to other portions of said instructions, he be in no degree deemed to acquiesce therein, his omission so to do being because the bills of exception heretofore taken by him cover the matters of law announced by the court in such other portions of its instructions.)

Deft.'s 18th bill of exceptions.

And thereupon the court, upon the request of the plaintiffs, gave in charge to the jury the following instruction:

228 3rd. The title of the plaintiffs to the land in suit was a defeasible title, and if the plaintiffs failed for the period of nine years either to take possession of or sell the same, or become citizens, the State had the right by legal process to forfeit the land in the State; but no party but the State had that right, and until the State does so forfeit the land the title of such aliens stands on the same footing as other titles.

To which action or ruling of the court in giving said instructions to the jury the defendant then and there duly excepted.

Deft.'s 19th bill of exceptions.

And thereupon the court, upon the further request of the plaintiffs, gave in charge to the jury the following instruction:

4th. The defendant sets up as a special defense that he is an innocent purchaser without notice. On this point you are instructed that under the decisions and laws of the State of Texas can only avail a defendant who holds by a patent from the republic or State of Texas, based upon a valid land-warrant and survey, and does not embrace the character of title exhibited by the defendant.

229 To which action or ruling of the court, in giving said instructions to the jury, the defendant then and there duly excepted.

And the defendant tenders in open court all of his said and foregoing bills of exceptions, consecutively numbered from 1 to 19 inclusive, and asks that the same and each one thereof be examined and allowed, and be signed and sealed and made a part of the record of this cause, which is accordingly done.

W. B. WOODS, [SEAL.]
Judge.

230 Defendants' application for writ of error,

Endorsed, to wit: "U. S. circuit court. Law side. Anna R. de Massieu et als. vs. C. H. Airhart. No. 1283. Deft.'s application for writ of error. Filed Feb. 18, 1875. M. Hopkins, cl'k."

Which is in words as follows:

Application for writ of error.

U. S. circuit court for west. dist. of Texas, Jan'ry term, 1875.

A. R. DE MASSIEU ET ALS. *vs.* C. H. AIRHART. } No. 1283.

Now comes the defendant in the above-entitled cause, and says that at the said January term, 1875, and on the 16th day of February, 1875, a final judgment for the land sued for was rendered in said cause, in favor of the plaintiffs and against this defendant, and that in the record, proceedings, and judgment, manifest error has intervened, to the damage of said defendant, all of which this defendant is ready to verify. Wherefore the said defendant prays that a writ of error issue, returnable to the Supreme Court of the United States, at Washington

231 City, at the next term thereof, together with citation and supersedeas, as required by law, so that the errors in said record, proceedings, and judgment may be examined by the said Supreme Court, and the aforesaid judgment be reversed, and what is right be done in the premises, &c.

Feby. 17th, 1875.

REAGAN & GREENWOOD,
WORD & JACKSON,
Attys. for Deft.

Supersedeas bond, endorsed, to wit: "1283. C. H. Airhart, plff. in error, vs. Anna Redding de Massieu & others, defts. in error. Supersedeas bond. Filed Feb. 25, 1875. M. Hopkins, clerk."

Which is in words as follows:

Supersedeas bond.

Know all men by these presents, that we, J. M. Hughes, W. C. Derden, W. L. Edwards, Jacob Crist, R. M. Jackson, Jas. H. Gee, & L. F. Airheart, are held and firmly bound unto Anna Redding de Massieu, Alexander Massieu, Louis Massieu, Julia Terresa Massieu, Adelfina Massieu, defendants in error, in the full and just sum three thousand
dollars, to be paid to the said Anna Redding de Massieu,
232 Alexander Massieu, Louis Massieu, Julia Terresa Massieu, and Adelfina Massieu, or to their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of February, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas at the January session of the United States circuit court for the western district of Texas, held at the city of Austin, Texas, the honorable W. B. Wood, United States circuit judge, and Thomas H. Duval, United States district judge and exercising the powers of a circuit judge, presiding, in a suit depending in said court, No. 1283, between Anna Redding de Massieu, Alexander Massieu, Louis Massieu, Julia Terresa Massieu, and Adelfina Massieu, plaintiffs, against C. H. Airheart, on the law side of said court, in an action of trespass, to try title, a judgment was rendered at said session of said court on the sixteenth day of February, in the year of our Lord one thousand
233 eight hundred and seventy-five, against C. H. Airheart, otherwise H. C. Airheart, for two thousand and eight acres of land, and in favor of said Anna Redding de Massieu, Alexander Massieu, Louis Massieu, Julia Terresa Massieu, and Adelfina Massieu, for the eleven leagues of land described by the said Anna Redding de Massieu, Alexander Massieu, Louis Massieu, Julia Terresa Massieu, & Adelfina Massieu, in their original petition, & also described in said judgment No. 1283, bearing date as aforesaid, and the said C. H. Airheart, otherwise H. C. Airheart, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Anna Redding de Massieu, Alexander Massieu, Louis Massieu, Julia Terresa Massieu, and Adelfina Massieu, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, the first Monday of October next:

Now, the condition of the above obligation is such, that if the said C. H. Airheart, otherwise H. C. Airheart, shall prosecute his said
234 writ of error to effect, and answer all damages & costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

I. M. HUGHES. [SEAL.]
W. L. DERDEN. [SEAL.]
W. L. EDWARDS. [SEAL.]
JACOB CRIST. [SEAL.]
R. M. JACKSON. [SEAL.]
JAS. H. GEE. [SEAL.]
L. F. AIRHEART. [SEAL.]

Approved.

T. H. DUVAL,
U. S. Judge.

The writ of error is endorsed, to wit: "In the Supreme Court of the United States. C. H. Airheart, otherwise H. C. Airheart, plff. in error, vs. Anna Redding de Massieu and others, defts. in error. Writ of error to the Supreme Court of the United States. Issued 5th day of March, A. D. 1875. M. Hopkins, clerk."

And is in words to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the
235 circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said circuit court, before you, between Anna Redding de Massieu, Julia Tresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu, who are plaintiffs, and C. H. Airhart, (otherwise H. C. Airhart,) who is defendant, No. 1283, on the docket of said circuit court of the United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of said C. H. Airhart, (otherwise C. H. Airheart,) who is plaintiff in error herein, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
236 same at Washington on the second Monday of October next, in said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court, the 5th day of March, in the year of our Lord one thousand eight hundred and seventy-five, and seal of our said circuit court, at Austin, in the 99th year of the Independence of the United States.

[L. S.] M. HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin.

Allowed by—

T. H. DUVAL,
U. S. Judge.

Citation in error is endorsed, to wit: "In Supreme Court of the United States. C. H. Airhart, (otherwise H. C. Airhart,) plff. in error,
237 vs. Anna Redding de Massieu and others, defts. in error. Citation in error issued 5th day of March, A. D. 1875. M. Hopkins, clerk U. S. court, Austin."

And is in words, to wit:

United States of America to Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu, or their attorneys of record, John Hancock, C. S. West, & W. F. North, partners under the firm-style of Hancock, West & North:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second

Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein C. H. Airhart (otherwise H. C. Airhart) is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

238 Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 5th day of March, in the year of our Lord one thousand eight hundred and seventy-five.

[L. S.] T. H. DUVAL,
U. S. Judge.

Test with the seal of court at Austin this 5th day of March, A. D. 1875.

M. HOPKINS, *Clerk.*

239 I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing two hundred and thirty-eight pages, with the maps and Spanish documents, contain a full and true transcript of the record of all the proceedings had in case No. 1283, entitled Anna R. de Massieu et al. vs. C. H. Airhart, as they appear of file and record in this court in said cause.

In testimony whereof I have hereunto set my hand and seal of said court at Austin this 4th day of October, A. D. 1875.

[SEAL.] M. HOPKINS, *Clerk.*

(Indorsement on cover:) No. 570. C. H. Airhart, (otherwise H. C. Airhart,) plaintiff in error, vs. Anna Redding de Massieu, Julia Teresa Massieu, Adelfina Massieu, Luis Massieu, and Alexander Massieu. W. Texas C. C. U. S. Filed 2nd December, 1875.

Supreme Court of the United States.

NO. 570.

C. H. AIRHART, (otherwise H. C. AIRHART),
Plaintiff in Error,

vs.

ANNA REDDING De MESSIEU, JULIA TERESA MESSIEU, ADELFINA MESSIEU, LOUIS MESSIEU, and ALEXANDER MESSIEU.

Error in the Supreme Court of the United States from the Western District of Texas.

1st. Statement of the Case.

This suit was brought on the 13th day of June, A. D. 1872, by the defendants in error, Anna Redding Messieu and her four children, viz: Julia Teresa Messieu, Adelfina Messieu, Louis Messieu, and Alexander Messieu, claiming to be citizens of the City of Mexico, in the Republic of Mexico, against H. C. Airhart, of Anderson County, Texas, to try the title to eleven leagues of land, situated in Anderson and Freestone Counties in the State of Texas, and for the possession of the same, and for damages.

Defendants in error (plaintiffs below) allege in their petition substantially that on the 1st day of July, 1869, they were the possessors and legal owners of the land sued for; and that on said day said Airhart illegally ejected them therefrom, and that he forcibly withholds the same from them; that they were damaged forty

thousand dollars, and that the land was worth one hundred thousand dollars; and they pray for a judgment for their damages, and for a writ of possession. (See page 4 of the record.)

On the 10th of January, 1873, the plaintiff in error (defendant below) filed—

1st. A general demurrer to plaintiff's petition.

2d. A plea of not guilty.

3d. A plea setting up title in himself and possession of eighteen hundred and forty-five acres of land, being the south part of the E. C. Harris survey, and also to all that tract of land situated in Anderson county, in the State of Texas, known as R. S. Patton's Headlight, bounded as follows: Beginning where the Harris league line crosses the old Patton line, at Fulton's corner, running east 498 $\frac{96}{100}$ varas to the southwest corner of C. L. Reinbrough's lower survey in the old Patton line; thence north 1,900 $\frac{8}{10}$ varas to a black-jack tree marked R. P., in the old Patton line; thence west 498 $\frac{96}{100}$ varas to where the Harris league line crosses the north boundary of the old Patton survey; and thence south 1,900 $\frac{8}{10}$ varas to the place of beginning.

4th. A disclaimer of any right, title, or possession of and to any other portion of the land claimed by plaintiff than that claimed in his answer.

5th. The plea of the statutes of limitation of the State of Texas of three, five and ten years.

6th. A plea setting up the statute of the State of Texas which bars the plaintiff's right of action for non-entry on the land within ten years.

7th. A plea of settlement, in good faith, on the land claimed by plaintiff in error, and asking judgment for the value of the improvements on the same. (See pages 4, 5, and 6 of the record.)

On the 1st day of June, 1874, the plaintiff in error (defendant below) amended his pleadings—

1st. By a plea setting out his true Christian name as Henry C. Airhart, and not C. H. Airhart. (Record, page 7.)

2d. Several pleas setting up a superior legal title in himself, and in each of the persons from or through whom he derived title, at the inception of his and of their titles to the 1,355 acres of land claimed by him in this suit, because the failure of plaintiffs to have their supposed title recorded in the county where the land lies, or to furnish other notice of the existence of their grant prior to the date of the acquisition of title to the same by said Airhart or any of those from or through whom he derived his title.

3d. A plea alleging that said plaintiffs, in the court below, had not paid the taxes on the land in controversy, and that the defendant had paid the taxes on the same. (See Record, pages 7 to 9.)

On the 8th day of January, 1875, the plaintiff in error (defendant below) further amended his pleadings by filing two amended answers—

1st. That Anne Matilda Messieu, the ancestor of the plaintiffs, from whom they claim to have inherited the land in controversy, was, during her life and at the time of her death, a citizen of the Republic of Mexico, and an alien to the United States of Amrica and to the Republic and State of Texas; and that said plaintiffs, Anna Redding Messieu, Julia Teresa Messieu, Adelfina Messieu, Louis Messieu, and Alexander Messieu are natives and citizens of the Republic of Mexico, and were so at the time of the death of their said ancestor; and that as such aliens they could not take title by inheritance from their alien ancestor.

2d. That said defendant Airhart had been in the ad-

verse possession of the lands in controversy in good faith for more than one year next before the institution of this suit of plaintiffs, and that he had made lasting and valuable improvements thereon, and prays the court for judgment for the value of said improvements. (See Record, pages 9 to 10.)

On the 8th day of January, 1875, the plaintiffs, by an amended petition, except the legal sufficiency of the plea of defendant averring the alienage of plaintiffs and of their ancestors, and excepting to said answer as vague, indefinite, and as presenting no issuable matter, and denying the matters stated in said amended and original answers. (See record, pages 11 and 12.)

On the 18th day of January, 1875, plaintiffs filed an amended petition in which they say—

1st. They except to the legal sufficiency of defendants' plea of the statute of limitations of three years.

2d. They except to so much of defendant's amended answers as suggests improvements made in good faith, because they say the same is insufficiently stated, and set up matters which cannot be considered by the court.

3d. They except so much of said answers as set up the alienage of plaintiffs, because the same are insufficient and constitute no defense.

4th. They except to so much of said answers as set up the plea of innocent purchasers without notice, because they allege the same is not properly pleaded, and sets up no legal defense, and is an equitable and not a legal defense.

5th. They allege that plaintiffs were infants, under twenty-one years of age, and plead infancy from the 7th of September, 1851, down to the filing of their petition bringing this suit in reply to defendant's plea of limitation.

6th. That from the 28th day of January, 1861, until the 30th of March, 1870, all statutes of limitation were suspended in the State of Texas.

7th. They deny that the possession of said defendant was notorious or peacible; and aver, that the running of the statute of limitation was suspended by the defendant and others entering into unlawful *continuous* (probably combinations) for preventing possession being taken by or on behalf of plaintiffs, and that defendant's possession was by violence, force, and intimidation. (See Record, pages 12 and 13.)

On the 25th day of January, 1875, defendant excepted to the legal sufficiency of the plea of infancy for plaintiffs, and because it fails to set forth facts to make the plea good. And answer—

1st. That the pretended protocol of the pretended eleven-league grant to Juan Ygnacio Aguelara was never, at any time, prior to the 14th day of July, 1873, deposited or filed among the Mexican archives in the general land office of the State of Texas, or in any other part of said general land-office; that the Edward C. Harris survey for one elague of land was made in 1835, and the title for the same issued by the government of Coahuila and Texas, to said Edward C. Harris, on the 26th of June, 1835, and part of which is described in defendants answer, and is owned by the defendant; that said Harris acquired his said title from the Government of Coahuila and Texas, under their colonization laws, as a settler in Bennett's Colony, and that said Harris had no knowledge of said eleven-league grant. And defendant says that in his answer wherein he alleges that said Harris was a purchaser of said league of land, he did not mean that he was a *purchaser* as known to the colonization laws of Coahuila and Texas, but used the word purchaser in its common-law meaning.

2d. That the land described in his answer, as being a part of the Robert S. Patton survey, was first located and surveyed on the 30th of July, 1854, and was patented by the State of Texas on the 25th of November, 1854; and that, subsequently, being found in conflict with the Edward C. Harris grant, was, on the motion and affidavit of said Patton, cancelled by the Commissioner of the General Land-Office, and the land re-surveyed, by virtue of the first location, on the 16th of November, 1856, and patented by the State of Texas, on the 4th day of February, 1857; and defendant charges that at the date of the location and survey of the tracts of land claimed by him, the plaintiff, had failed to have the testimonio of the grant of said Juan Ygnacio Aguelera duly recorded in the office of the Clerk of the County Court of the county in which the land was situated.

3d. That at no time prior to the survey for Harris, and at no time prior to the sale from Harris to Hotchkiss, and at no time prior to the sale from Hotchkiss to Vale, and at no time prior to the sale from Vale and wife to Mynatt and wife, and at no time prior to the sale by Mynatt to Kimbraugh, and at no time prior to the sale by Kimbrough to Dun and Airhart (the defendant), and at no time prior to the sale from Dun and wife to Airhart (the defendant), and at no time prior to the sale by Patton to Kimbraugh, did said plaintiffs have duly recorded in the office of the Clerk of the County Court of the county in which their land was situated, the testimonio of the grant to Juan Ygnacio Aguelera; and defendant Airhart charges that he and those under whom he claims had no actual notice of said Juan Ygnacio Aguelera grant, and that if plaintiffs ever had a title it has long since been postponed to the superior legal title of the defendant.

4th. And for the plea in bar and by way of answer to

the plea of infancy of plaintiffs, defendant avers that plaintiffs pretend to own the land in controversy as heirs at law of Anna Matilde Messieu, deceased, and that Anna Matilde Messieu, at the date of her death, was only seventeen years of age, and an infant; that the statute of limitations commenced to run against the estate of said Anna Matilde, after being suspended by law for one year from the date of her death, and that said statute of limitations has not been suspended since except during the period from the 28th of January, 1861, until the 30th of March, 1870; that plaintiffs cannot tack the infancy of Anna Matilde Messieu to their alleged infancy to suspend the resuming of the law of limitations; that Anna Bedding Messieu has at no time been an infant for the past forty years; and defendant denies that either of the defendants were infants as alleged in their amended petition. (See Record, pages 13 to 15.)

On the 5th day of January, 1875, plaintiffs filed an amended petition (not printed in proper chronological order in the record), and aver that under and by virtue of the Constitution, laws, and treaties of the United States, and under and by virtue of the constitution and laws of Texas, they are entitled to maintain this action in the courts of the United States, and are authorized and permitted to sue in said court. (See Record, page 15.)

On the 8th day of February, 1875, defendant filed a general exception to plaintiffs' plea, filed on the 6th of February, and also a special exception to the same, because plaintiffs do not set forth therein the facts on which they rely under the Constitution, laws, and treaties of the United States, and under the constitution and laws of the State of Texas, to enable them, as aliens, to sue and maintain this action in this court; and because plaintiffs in said plea rely on averments of conclusions of law, and not on averments of facts. (Record pages 15 and 16.)

On the 8th day of February, 1875, plaintiffs filed an amended petition, averring that said plaintiffs, except the said Anna Redding Messieu, were, from the 1st day of October, 1851, and prior to that date, minors and unmarried persons under twenty-one years of age, and so continued until the first day of January, 1870; and that they are not barred or precluded of their right of recovery in this case by reason of the possession, if any possession be had, of said defendant. (See Record page 16.)

And on the same day defendant filed exceptions to the plea of the infancy of a portion of the plaintiffs, this day filed, because the same is not sufficient in law, and because plaintiffs do not state such facts as will enable them to recover in this action.

And on the same day defendant filed an amended answer, averring that plaintiffs were aliens and citizens of the Republic of Mexico at the date when their pretended title accrued to the land sued for, and that they did not take possession and sell said land within nine years from the date when Anna Matilde Messien died, under whom plaintiffs claim title; and that neither one of said plaintiffs has ever become a citizen of the United States or of the State of Texas, but have remained permanent citizens of the Republic of Mexico, whereby said land has been forfeited and escheated to the State; and he prays the court for judgment. (See record pages 16 and 17.)

The general and special demurers of defendant to plaintiffs original and amended petitions were overruled by the court, to which ruling the defendant excepted. The exceptions of plaintiffs to the original and amended answers of defendant, were all overruled by the court, except the special exceptions of plaintiffs, questioning the sufficiency of the defendant's pleas of alienage and claim by inheritance of plaintiffs, which exceptions were sustained by the court, to which ruling the defend-

dant excepted. Another special exception of defendant as to the sufficiency of plaintiffs replication of coverture and infancy were heard and overruled by the court. (See Record page 28.) The cause was then submitted to a jury, who heard the evidence, arguments of counsel and instructions from the court, and retired to consider of their verdict, who found for plaintiffs the whole of the land sued for, also found that the Harris tract of land consisting of 1855 acres was of the value of two dollars per acre without the improvements, and that the improvements were of the value of $4,500. In accordance with which verdict the court rendered a judgment for plaintiff. (See Record page 29.) The plaintiff in error filed his motion for new trial February 16th, 1875, based upon the ground. 1st. That the verdict is contrary to the law and the charge of the court. 2d. The verdict is contrary to the evidence. 3d. The court erred in its instructions to the jury and in refusing instructions asked by the defendant, as shown by defendant's bills of exceptions. 4th. The court erred in admiting evidence offered by the plaintiffs, and in the exclusion of evidence offered by the defendant shown by defendant's bills of exception. (See motion p. 30 of record.) On the same day said motion was overuled by the court. (See p. 31 of record.)

2d. Assignment of Errors.

The plaintiff in error maintains that the following errors were committed by the lower court in its proceedings in the trial of said cause, viz.:

1st. The court erred in overruling the general exception of plaintiff in error to the original petition of defendants in error. (See first bill of exceptions, pp. 54, 55, and 56 of record.)

2d. That the court erred in overruling the general

and special exceptions of plaintiff in error to the original and amended petition of defendants in error. (See 2d bill of exceptions, pp. 58 and 59 of record.)

3d. That the court erred in sustaining the exception of defendants in error to the amended answer of plaintiff in error, setting up the defense of alienage and setting up the defense that the defendants in error had no right to claim the property sued for by inheritance as heirs through and from an alien ancestor. (See third bill of exceptions, pp. 59 and 60 of record.)

4th. That the court erred in overruling the objection of plaintiff in error to the introduction in evidence of the original grant of the Government of Coahulia and Texas to J. Ygnaceo Aguillera to the 11 leagues of land sued for as an authenticated and recorded instrument under the laws of Texas. (See fourth bill of exceptions, pp. 60 to 71, inclusive, of record.)

5th. That the court erred in permitting to be read as an authenticated and duly-recorded instrument under the laws of Texas the testimonio of an act of sale by José Ignacio Aguillera before Miguel Bonilla, a notary public of the city of Mexico, dated at the city of Mexico March 10th, 1836, purporting to convey title to the land sued for to Anna Matilda Messieu, infant daughter of Victor Messieu. (See fifth bill of exceptions, pp. 71 to 74, inclusive, of Record.)

6th. That the court erred in permitting to be read the copy of the original act of sale made by Jose Ygnaceo Aguillera to Anna Matilda Messieu, before the notary public of the city of Mexico, Miguel Borrilla, purporting to convey the land in suit on the testimony of E. A. Mexia, there being several witnesses named in said act of sale, and neither one of said witnesses being accounted for, and said Mexia not being a party to, said act of sale. (See 6th bill of exceptions pp. 74 and 75 of record.)

7th. That the court erred in refusing to exclude from the jury all the evidence introduced by defendants in error to prove the transfer of title, on the said 10th of March, 1836, from said Aguelera to said Victor Messieu, or to said Anna Matilda Messieu, because, on said 10th of March, 1836, there was a state of flagrant war existing between the Republic of Mexico and the Republic of Texas; and therefore could, at that date, have been no livery of seizing in fact, and no actual transmission of possession of the lands sued for, as between the parties to said act of sale, and because the same was wholly inoperative to transfer title to the lands in controversy. (See 7th bill of exceptions and record p. 75.)

8th. That the court erred in overruling the objections of plaintiff in error to the advisibility of the act of sale from Don Jose Ygnacio Aguelera to Don Victor Messieu and to Dona Anna Matilda Messieu, (page 69 of the record,) and the consular certificate of Julius A. Skilton. (Pages 75 to 77 of the record.) 1st. Because they were not filed in court three days before the commencement of the trial of the cause, and because the defendant in the court below was not notified of the same before they were offered in evidence. 2d. Because the said affidavits were not filed in court one day before the trial commenced. 3d. Because the said affidavits were and are mere ex-parte affidavits, made without the knowledge of the defendant, and not taken by virtue of any commission issued from said court, nor by the authority of any law of the State of Texas, or of the United States, so as to furnish legal evidence in said cause of the correctness of said copy. (Record pp. 77 and 78.)

9th. That the court erred in excluding from the jury as evidence the authenticated and recorded deed from E. M. Dunn and his wife, Ann, to plaintiff in error, pur-

porting to convey their interest to plaintiff in error in 1845 acres of land of the Harris grant, and 153 acres of land of the R. S. Patton grant, upon the ground that the revenue stamps on said deed had never been cancelled, and that said deed was void and could not be read as a recorded instrument. (See record pp. 78 and 79 of record.)

10th. That the court erred in excluding from the jury as evidence, certified copy from the General Land-Office of the patent by the State of Texas, No. 357, issued on 25th November, 1854, to Robert S. Patton, for ⅓ of a league and labor of land, comprising 153 acres claimed by plaintiff in error. Also deed from R. S. Patton to Thomas G. Kimbrough, dated December 30th, 1854, conveying said land mentioned in said patent, and recorded in Anderson County, on January 1st, 1855; also a certified copy from General Land Office of Patent No. 682, vol. 12, issued February 4th, 1857, to said Robert S. Patton for 10 and a fraction labors of said ⅓ of a league as was not in conflict with said Edward C. Harris league and the deed from T. G. Kimbrough to E. M. Dunn and the plaintiff in error, dated February 1st, 1869, purporting to convey to plaintiff in error 153 acres of said R. S. Patton survey, which deed was authenticated before W. H. King, County Clerk of Anderson County, Texas, on the 12th day of March, 1869, and recorded by said clerk on the 13th of May, 1869, which last deed was excluded upon objection by defendants in error, because the internal revenue stamps affixed to said deed had never been cancelled, and the other deeds mentioned were excluded upon motion of defendants in error without any reason. (See 10th bill of exceptions, page 79.)

11th. That the court erred in refusing to exclude as evidence from the jury the copy of grant of eleven

leagues of land to Jose Ygnacio Aquellera, introduced in evidence by defendants in error, because the protocol of said copy was not an archive in the General Land Office of Texas, the said protocol never having been filed among the Spanish archives in said General Land Office, or deposited therein till the 14th day of July, 1873, by E. A. Mexica, and after the institution of this suit. (See 11th bill of exceptions, pp. 79 and 80 of record.)

12th. That the court erred in excluding as evidence from the jury the deed from Thos. G. Kimbrough to E. M. Dunn, a plaintiff in error, conveying 153 acres of land of the Robt. S. Patton Headlight, bearing date February 1st, 1869, and the testimony of one of the subscribing witnesses to said deed by whom plaintiff in error offered to prove the execution and delivery of said deed from said T. G. Kimbrough to E. M. Dunn, and this plaintiff in error, in open court, which deed and proof by said witness was rejected because the revenue stamps affixed to said deed were not cancelled at the date of execution of said deed, and because no one but the maker of said deed could cancel said stamp, the said plaintiff in error offering in open court first to cancel said stamp. (See 12th bill of exceptions in the Record, page 80.)

13th. That the court erred in failing to instruct the jury, as requested by plaintiff in error, viz: "That if the proof shows that the plaintiffs claim the land sued for by inheritance from, and as heirs of, Anna Matilda de Messieu, and she died in the month of August, 1851, or in the year 1851, and that the said Anna Matilda was at that time a citizen of the Republic of Mexico and an alien to the State of Texas and to the United States of America, and that said plaintiffs were at the date of her death citizens of the Republic of Mexico and aliens to the State of Texas and to the United States of

America; and if the proof further shows that said plaintiffs did not become citizens of the State of Texas or of the United States of America, and take possession of said land in nine years from the date of the death of said Anna Matilda, then the plaintiffs have no title to the land sued for, and you should find for the defendant." (See 1st paragraph of 13th bill of exceptions, pages 80 and 81 of Record; also, 4th, 5th, 6th, and 7th bills of exceptions for the facts to support the charge.)

14th. That the court erred in failing to instruct the jury, as requested by plaintiff in error, viz: "That if the proof shows that the plaintiffs claim the land sued for by inheritance from, and as the heirs of, Anna Matilda de Messieu, and that at the date of the death of Anna Matilda de Messieu she was a citizen of the Republic of Mexico and an alien to the State of Texas and to the United States of America, and that at the date of the death of the said Anna Matilda these plaintiffs were also citizens of the Republic of Mexico and aliens to the State of Texas and to the United States of America, then the said Anna Matilda de Messieu, as such alien, had no inheritable blood, and the title to said land could not pass by inheritance from her to plaintiffs, and such aliens took no title to said land by inheritance from her, and you should find for the defendant." (See 2d paragraph of said 13th bill of exceptions, p. 81, and for evidence to support said charge, see bills of exceptions Nos. 4, 5, 6 and 7 in the Record.)

15th. That the court erred in refusing to give in charge the third charge requested by plaintiff in error, viz.: "3d. That if the act of conveyance of the land sued for was made by Jose Ygnacio Aguilera to Anna Matilda de Messieu in the Republic of Mexico on the 10th day of March, 1836, and if at that time the said Aguilera and the said Messieu were citizens of said Republic of Mexi-

co and aliens to the Republic of Texas, and if the Republic of Mexico and the Republic of Texas and their people were then at open war with each other, (and of this fact the courts and juries of the country will take notice from the public history of the country,) and if at the time of said sale said Aguilera did not deliver the actual possession of said land to said Messieu, then we charge you that under these facts there could have been no livery of seizure and no constructive delivery of the possession of the same, and that said act of sale was inoperative and void, and did not transfer the title to said land from satd Aguilera to said Messieu, and you should find for the defendant." (See fourteenth bill of exceptions, p. 81 of record.)

16th. That the court erred in refusing to give in charge to the jury the fourth, fifth, and sixth charges requested by plaintiff in error as follows: "4th. If the proof shows that the original title of the plaintiff to the land in controversy was not on file in or among the archives of the General Land Office of the State of Texas, and that the testimonio of said title was not duly recorded in Anderson or Freestone county, and that the survey of said plaintiffs was not plotted on the map of Anderson County kept in the office of the county surveyor of said county, or in the General Land Office of the State of Texas, by virtue of a title on file authorizing the same to be so plotted; and that the defendant had no actual notice of the existence of the title of plaintiffs to said land, and that the defendant had no such other notice as should have put a prudent man upon reasonable enquiry as to the existence of plaintiffs' title, and as would have enabled him, upon such enquiry, to ascertain the existence of the title of plaintiffs at the date or dates upon which the defendant acquired his title or titles to the land he claims, then he is an innocent purchaser without

notice, and you should find for him. And we further charge you that, if any or all of the persons under, by, or through whom the defendant acquired his title to said land acquired the same as an innocent purchaser or purchasers, without notice as defined in the foregoing charge, then such title or titles inured to the benefit of this defendant, and you should find for him. "P" 5, the sketch on which is marked a plat of the Aguilera and other grants produced from the General Land Office, and a copy of which is in evidence before you, is not constructive notice to the defendant, and was not constructive notice to those under, by, and through whom he derived his titles of the existence of the grant to plaintiffs, unless the evidence shows further that it was identified and plotted on the public and official maps in the General Land Office, so as to show the connection of the surveys represented on it with the lands adjacent to it, and the locality and identity of the lands claimed by plaintiffs; and, unless the proof shows also that said sketch represented a survey of land for which there was a known and valid survey or title in the General Land Office. And it is not evidence of actual notice for any purpose, unless it is shown by the proof that the defendant knew of its existence, "P" 6th; that the translated copy of a list or abstract of ceteos (leagues) and labors of land granted by the government of Coahulia, Texas, &c., certified by the Spanish translator and Commissioner of the General Land Office, which has been allowed to go in evidence before you, subject to the charge of the Court, is not evidence of constructive notice to the defendant of the existence of the grant of land claimed by plaintiffs, unless you believe from the evidence, dates, &c., that the Ygnacio Aguilera grant therein referred to is the grant claimed by plaintiffs in this suit, and unless you also believe that the grant therein referred to was on file in the General Land Office before the defendant ac-

quired his title to the land in controversy." (See 15th bill of exceptions, pp. 81 to 85 of Record, inclusive.)

17th. That the court erred in refusing to give in charge to the jury the whole of the 7th charge requested by plaintiff in error, and in excluding the following part of said charge, viz: "And if you find from the proof that under the foregoing part of the charge the right of a part of the plaintiffs is barred and that the right of a part of them is not barred, then you cannot, in this suit, find for those whose right is not barred, and should find for the defendant." (See 16th bill of exceptions, page 86 of Record.)

18th. That the court erred in refusing to instruct the jury as follows, viz: "That although the grant under which plaintiffs claim is older than the title under which the defendant claims, yet, if the plaintiffs neglected to register their title and the defendant acquired his title in good faith and without notice or knowledge of the title under which plaintiffs claim, therefore the plaintiffs' title is postponed to the title of defendant, which, by reason of the neglect of the plaintiffs to register their title and of the good faith of defendant in acquiring his title, became the superior and better title;" and in charging the jury instead thereof, "This defence, even if it were a good one, can only apply to the Harris tract, for that is the only part of the lands in controversy to which defendant shows any title in himself. But we instruct you that under the proof in this case this defence is not good as to any part of the land;" and in further instructing the jury, viz: "It is in evidence that both the title of plaintiffs and the title of defendant originated while Texas was a part of Mexico and subject to the laws before the declaration of Texan independence and before the adoption of the plan and powers of the Provisional Government of Texas. In a word, they are 'both titles emenating

from the Mexican government. If you find these facts to be true, we are of the opinion, and so instruct you that under this state of facts the junior, which is the defendant, is not entitled to any advantage for the want of registration of the said title to the plaintiffs. In other words, the fact that the plaintiffs failed to register their title, and that defendant acquired his in good faith and without notice of plaintiffs' title constitutes no defence to this action." (See 17th Bill of Exceptions, p. 87.)

19th. That the court erred in giving in charge to the jury the 3d charge requested by defendants in error, viz: "The title of the plaintiffs to the land in suit was a defeasible title, and if the plaintiffs failed for the period of nine years either to take possession of or sell the same, or become citizens, the State had the right by legal process to forfeit the land in the State, but no party but the State had that right, and until the State does so forfeit the land the title of such aliens stands on the same footing as other titles." (See 18th bill of Exceptions, pages 87 and 89 of Record.)

20th. That the court erred in giving in charge to the jury the 4th charge requested by the defendants in error, viz: "The defendant sets up as a special defence that he is an innocent purchaser without notice. On this point you are instructed that under the decisions and laws of the State of Texas they can only avail a defendant who holds by a patent from the Republic or State of Texas, based upon a valid land warrant and survey, and does not embrace the character of title exhibited by the defendant." (See 19th bill of Exceptions, p. 88 of Record.)

21st. That the court erred in overruling the motion of plaintiff in error for a new trial. (See Record, pp. 30 and 31.)

Brief and Argument.

I. To sustain the 1st and 2d errors, assigned by plaintiff in error, reference is made to the 10th section of the general provisions of the constitution of the Republic of Texas, which declares that:

"No alien shall hold land in Texas, except by titles emanating directly from the government of this Republic. But if any citizen of this Republic should die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same, in a manner hereafter to be pointed out by law." (Pascquel Digest, vol. 1, pp. 37 and 38.)

By Section 9 of the act of the Legislature of Texas, of March 8th, 1848, (Pasch. Dig., vol. 1, p. 105,) it is provided that "in making titles to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the Republic, and take possession of said land; or shall have nine years to sell the same, before it shall be declared to be forfeited, or before it shall escheat to the government."*

In this case there is no pretence that the defendants in error derived their title from the government of Texas, or from a citizen of Texas, directly or through an alien ancestor, or that they had become citizens of Texas, or taken possession of the land within nine years.

By sec. 20 of art. 7 of the Constitution of the State of Texas, of 1845 (Pasch. Dig., vol. 1, p. 65), it is provided that "the rights of property and of action which

*This is a re-enactment of the 14th section of the act of the Congress of the Republic of Texas of January 28th, 1840.

have been acquired under the Constitution and laws of the Republic of Texas shall not be divested, nor shall any rights or actions which have been divested, barred, or declared null and void by the Constitution and laws of the Republic of Texas, be re-invested, revived, or re-instated by this constitution; but the same shall remain precisely in the situation in which they were before the adoption of this constitution."

This provision leaves the defendants in error in the same position, with reference to their claim to the land in controversy, that they were put by the constitution of the Republic.

Sec. 20, art. 7 of the Constitution of the State of Texas, adopted in 1866 (Pasch. Dig., vol. 1, p. 941), re-adopts the foregoing section of the constitution of 1845 without change.

Sections 1 and 2 of the act of the legislature of Texas, of Feb. 13th, 1856 (arts. 45 and 46, Pasch. Dig., p. 106), are as follows:

"SEC. 1. Any alien, being a free white person, shall have and enjoy in the State of Texas such rights as are or shall be accorded to American citizens by the laws of the nation to which such alien may belong, or by the treaties of such nation with the United States.

"SEC. 2. Aliens may take and hold any property, real or personal, in this State, by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien."

These provisions liberalize our former legislation in this respect, but make the extension of these new privileges to foreigners to depend upon the extension of like privileges to American citizens, either by the laws of such foreigner's country, or by treaty between his coun-

try and the United States; and there is no pretence that there is any law of the Republic of Mexico, or any treaty between the United States and Mexico, under or by which an American citizen can hold land in that country; and there is no allegation in the petition and amended petitions of the defendants in error of the existence of either.

The general rule is that an alien cannot sue in our courts. The exceptions to this rule are such as are created by the Constitution, or treaties, or laws. We provide courts for the trial of causes of litigation between our own people, with such exceptions in favor of foreigners as may be provided by law. And when a foreigner institutes a suit in our courts it is as imperative on him to show under what provision of law he sues, as it is for a citizen to show, by proper averments, that he is a citizen, and within the jurisdiction of the court in which he sues. (See *White* v. *Sabariega*, 23d Texas, p. 247.) And see this whole opinion and the authorities quoted, beginning at page 245, as decisive of the question presented by these assignments of error. (See, also, *Heirs of Halliman* v. *Peebles*, 1st Texas, p. 771; *Yates* v. *Iams*, 10th Tex., 175; *Barret* v. *Kelly*, 31st Tex., pp. 482 and 483.) It is contrary to the policy of the common law, that an alien should plead as he impleaded touching lands in any court in the kingdom. (7 Bacon's Ab., title Uses and Trusts, E., p. 89. Chancery cannot compel one to perform a trust for an alien; 7 Bacon's Ab., title Uses and Trust, E.; 1st Bacon's Ab., title Abatement, B. 3, p. 6; Aliens, D., p. 137; Coke on Litt., 129; 1st Com. Dig., Alien, C. 5, p. 301.) "I recollect no case where an alien plaintiff has recovered in an action of ejectment." WASHINGTON, J., in *Kemp's Lessee* v. *Kennedy*, (1st Pet., C. C. 49; S. C., 5 Cranch, 173; *Orr* v. *Hodgson*, 4 Wheat., 453; 1 Dan. Chan., Pr. 53.) "There is no doubt that the well-settled doctrine of the common law of

England is, that an alien cannot maintain a real of mixed action." (*White* v. *Sabariega*, 23 Tex., 246.) "The plea that the plaintiff is an alien, interposed to a real action or one for the recovery of land, goes, in general, to defeat the right of action altogether, upon the principle of policy, which denies the right of an alien, in general, to inherit or hold lands." (*Hardy* v. *De Leon*, 5 Tex., 240, and the authorities there cited.) "The law is, that where a person dies leaving issue, who are aliens, the latter are not deemed his heirs at law, for they have no inheritable blood, and the estate descends to the next of kin, who have inheritable blood, in the same manner as if such alien issue were not in existence." (Same case, p. 242, and cases there cited.)

The 1st section of the act of the Congress of the Republic of Texas, of Jan. 20th, 1840, reads as follows:

"The common law of England (so far as it is not inconsistent with the constitution and acts of Congress now in force) shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress." (Pasch. Dig., p. 254, art. 978.) This is quoted so that it may be seen that the common law was in force in Texas at the time the plaintiffs claim to have acquired title to the land in controversy, on the death of their ancestor, in August, 1851. (See Record, p. 21.)

While it is supposed these authorities will dispose of this case, and require the court to reverse the judgment of the court below, and dismiss the case, it is deemed prudent to argue the other points raised.

It is, perhaps, due to the Circuit and District Judges, before whom the case was tried, to say that each of them expressed separate opinions in rendering their judgment on this demurrer, that the law, but for the authority of the two cases hereinafter mentioned, would be with the

plaintiff in error, but said, as they were required to follow the judgments of the higher court of the State, and as the Supreme Court of Texas had held otherwise in the case of *Sabariego* v. *White*, 31 Texas, 576, and in *Sittegast* v. *Scrimpp*, 35 Tex., 323, they would overrule the demurrer, and let the question be settled by the Supreme Court. The value of these two decisions, as authority, will be considered in the discussion of the 3d error assigned.

II. The 3d, 13th, and 14th assignments of error (which appear on pp. 59 and 60, and 80 and 81 of the record); the first instruction from the Court to the jury, asked by defendants in error, which was given by the Court (record, pp. 17 and 18); the first and second instruction from the Court to the jury, asked by plaintiff in error and refused by the Court (record, pp. 21 and 22); and the instruction of the Court given to the jury in the two paragraphs which follow the statement, by the Court, of the plaintiff's title (record, pp. 24 and 25), will all be considered together, as involving the question of the right of an alien heir to inherit from an alien ancestor. The common law of England was adopted as the rule of decision in Texas, by the act of the Congress of Texas of January, 1840, as hereinbefore quoted.

"An alien born may purchase lands or other estates, but not for his own use, for the king is thereupon entitled to them." (Blackstone's Com., vol. 1, p. 372.)

"Aliens are also incapable of taking by descent or inheriting, for they are not allowed to have any inheritable blood in them; rather, indeed, upon a principle of national or civil policy than upon reasons strictly feudal." (*Ib.*, vol. 2, p. 349.)

"As aliens cannot inherit, so far they are on a level with bastards; but, as they are disabled to hold by pur-

chase, they are under still greater disabilities; and, as they can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit. But so it is expressly holden, because they have not in them any inheritable blood." (See, also, the remarks following, upon the effect of derivation, which support the general doctrine stated. 2 Sharswood's Blackstone, pp. 249, 250.)

"An alien cannot acquire title to real estate by descent, or created by other mere operation of law. The law, *quae nihil fraus tra*, never casts the freehold on an alien heir, who cannot keep it. This is a well-settled rule of the common law. It is understood to be the general rule that even a natural-born subject cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. If an alien purchase land, or if land be devised to him, the general rule is that in these cases he may take and hold until an inquest of office has been had; but, upon his death, the land would instantly and of necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent." (Kent's Com., vol. 2, pp. 53, 54.)

(See, also, 1 Washburn on Real Property, p 49, or p. 74 and notes, 3d edition; 2 Spence's Eq. Juries, p. 14; *Ennor* v. *Franklin*, 2 Prevord, 398.)

There are six qualifications to this doctrine in Texas, and only six. They are:—

1st. That aliens may hold land in Texas by title derived directly from the government of the State, under the 10th Section of the General Provisions of the Constitution of the Republic of Texas.

2d. That "it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien."

3d. "Every alien to whom any land may be devised or descend, shall have nine years to become a citizen of the Republic, and take possession of said land; or shall have nine years to sell the same before it shall be decreed to be forfeited, or before it shall escheat to the government." These two last exceptions to the rule of the common law are created by the 14th section of the act of Congress of the Republic of Texas of January 28th, 1840, re-enacted March 8th, 1849. (Pasch. Dig., art. 44, p. 105.)

4th. "An alien, being a free white person, shall have and enjoy in the State of Texas such rights as are or shall be accorded to American citizens by the laws of the nation to which such citizen shall belong, or by the treaties of such nation with the United States." (Act of February 13th, 1854; Pasch. Dig., art. 45, p. 106.)

5th. "Aliens may take and hold any property, real or personal, in this State, by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien." (Same act, Pasch. Dig., art. 46, p. 106.)

6th. "Any alien, being a free white person, who shall become a resident of this State, and shall, in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this State, in the same manner as if he was a citizen of the United States." (Same statute, Pasch. Dig., art. 47, p. 106.)

Do the defendants in error come within either of these six exceptions to the rule of common law, that an alien

cannot take real property by inheritance from an alien ancestor? If not, then it was error in the Circuit Court to sustain the demurrer to the plea of plaintiff in error.

Under the first of the foregoing exceptions, it may be said that the 10th section of the general provisions of the constitution of the Republic of Texas, which declares that "no alien shall hold land in Texas, except by titles emanating directly from the government of this Republic," is prospective in its effect, and that there is no claim that the defendants in error claim by such a title.

Under the second exception, it is not claimed for the defendants in error, and cannot be, that they claim, *through* an alien ancestor, to inherit from a citizen, and are capable of casting the descent.

Under the third exception, it is not claimed, and cannot be, that the defendants in error claim to inherit from a citizen capable of casting descent, and that they became citizens of the State in nine years after descent cast, and took possession of the land.

Under the fourth exception, it will not be claimed, and cannot be, that under the laws of Mexico, or under any treaty between the United States and Mexico, an American citizen could take and hold lands in Mexico by inheritance from an alien.

Under the fifth exception, it cannot be claimed that a citizen of the United States can take and hold real property in Mexico by devise or descent.

Under the sixth exception, it is not pretended that the defendants in error had become residents of Texas and declared their intention to become citizens of the United States.

If the rule on this subject has been stated correctly, and if there are no other exceptions to it than those above named, then the defendants in error come under

the rule, above stated, and there is no escape from it unless the courts can make, as well as expound the law.

The doctrine that an alien heir could not take from an alien ancestor was well settled in Texas by the cases of *Hardy* v. *De Leon*, 5 Tex. R., pp. 239 and 240; *White* v. *Sabariego*, 23 Texas, 243; and *Barrett* v. *Kelly*, 31 Tex., 476; and, as affecting Texas titles, by a case which went, by writ of error, from the U. S. District Court of Texas to the Supreme Court of the United States—*McKinny* v. *Sabiego*, 18 Howard, p. 235.

In conflict with these cases are the two cases, hereinbefore referred to, of *Sabariego* v. *White*, 30 Tex., 576; and *Settegart* v. *Schrimpf*, 35 Tex., 323; and the same case on re-hearing, 38 Tex., 96.

This conflict in the decisions of the Supreme Court of Texas renders it proper to test the soundness of the cases in 30 and 35 Texas, and expose the errors into which the Court fell in the determination of these cases.

By looking to the case of *Sabariego* v. *White*, 30 Tex., 575, it will be seen that Francisco Garcia and his wife, Barrera, had acquired lands in Texas before the revolution of 1836; that Francisco, the husband, died at Goliad, Texas, where he and his wife resided, in 1834; that his wife, Barrera, her only daughter, Pilar, and her son-in-law, Manuel Sabriego, the husband of Pilar, after the commencement of the revolution, but before the declaration of Texan independence, removed to Matamoras, in Mexico, where they resided until the mother died, in 1842; that the daughter and her husband continued to reside there, and were citizens of Mexico when they brought this suit. In this case it is conceded that Pilar was entitled to her father's community interest, one-half of the land described, as she had inherited that portion before the revolution, and had not forfeited it under the principles of the case of *McKinny* v. *McMasters*, 20 How-

ard, p. 8, in which it is held that a division of empire works no forfeiture of rights, unless a forfeiture is otherwise provided for; and that on such division the citizen may elect to which part he will adhere. But the controversy in this case is about the one-half of these lands, the community interest of Barrera, the wife, by whom descent was cast, if at all, on Pilar, her daughter, at her death in 1842.

We have seen that the common law was adopted in Texas in 1840, two years before the death of Mrs. Berrera. And that if Pilar took her estate by inheritance it was in spite of the rule of the common law that an alien heir cannot take real property by inheritance from an alien ancestor.

In the opinion in 30 Tex., now being considered, the 19th Article of the Plan and Powers of the Provisional Government of Texas, of 1835, as to the forfeiture of lands by an abandonment of the country during its struggle for independence, and the 8th Section of the General Provisions of the Constitution of the Republic, on the same subject, are discussed by the court. It is submitted that the record of the case as stated in the opinion of the court, pp. 579 and 580, shows that these provisions might properly have been discussed, but that the question now under consideration, of the right of an alien heir to inherit from an alien ancestor, was not before the court, was not raised by the record, as shown by the court. It is therefore assumed that all that was said by the court on this subject of an alien's right to inherit from an alien, was not necessary to the disposition of the case, and was *obiter dicta*. But if the court was mistaken in the statement of what the record of the case was, and if the charge of the district judge, as given on page 580 of the opinion, is allowed to be sufficient to show that the record did raise the question of the right

of an alien heir to inherit from an alien ancestor, and that this question was before the court, then the following suggestions are offered in relation to it.

In the opinion in this case, in 30th Texas, p. 585, we find the following:

"If, then, the title was complete in Madam Berrera in 1842, at the time of her death, whither did the title go when she died? If she had no heirs at law, or if there were none who could take by succession, the common law having been adopted in 1840, the Republic would have become the inheritor of the estate, and would have taken it as an escheat. But, in order that the government may complete its title by escheat where there are no heirs, the government must do some act of its own to manifest publicly such claim of title; for it is the act of the government, coupled with the operation of law, which constitutes this title by escheat."

That the doctrine laid down is not correct, is shown—

1st. By the case of *Portis* v. *Hill*, 30 Texas, 523, in which it is held that "alien heirs of citizens of Texas had a right to inherit in coparcenary with citizens, under the constitution and laws of Texas." The same doctrine is also laid down in *Barclay* v. *Cameron*, 25 Tex., 240; and was recognized in *Cryer* v. *Andrews*, 11 Tex.. 170; and wherever the law gives rights to aliens it also gives them the remedies necessary to enforce them. (*White* v. *Sabariego*, 23 Tex., 246.) These cases, however, hold also, that the title thus descending from a citizen to alien heirs was a defeasible title, dependent on their performance of the conditions, as of removing to Texas and taking possession in nine years, and that upon non-performance the title vested in or was liable to escheat to the State. (See, especially, *Barclay* v. *Cameron*, 25 Tex., 231.)

2d. That aliens generally could not maintain suits for

land is determined in numerous cases. *Hardy* v. *De Leon*, 5 Tex., 240; *White* v. *Sabariego*, 23 Texas, 244, are directly to the point. So are *Halliman* v. *Peebles*, 1 Texas, 673; *Yates* v. *Iams*, 10 Texas, 194; and *Barrett* v. *Kelly*, 31st Texas, 482.

"It is contrary to the doctrine of the common law, that an alien should plead or be impleaded touching lands in any court in the kingdom." 2 Bacon's Ab., title Uses and Trusts, E. 89.

The same doctrine is held in courts of equity. 1 Daniels Ch. Practice, 53; 2d Spencer Eq. Jur., 14; *Orr* v. *Hodgson*, 4 Wheaton, 453.

"An alien could not hold land in the Republic; therefore it would have been error to decree a conveyance to him in this suit; yet, if the lands were taken in payment of debts due the alien, a court of equity would have ordered the lands to be sold and the proceeds paid over to him." *Merle* v. *Andrews*, 4 Texas, 216.

3d. "The estate of which an intestate alien dies seized vests in the State without office found." *Barclay* v. *Cameron*, 25 Texas, 240; *Barrett* v. *Kelly*, 31 Texas, 483; *Thomas* v. *Gray*, 1 Littell, 149; *Slater* v. *Mason*, 15 Pickering, 345; *Fairfax* v. *Hunter*, 7 Cranch. 603; *Montgomery* v. *Dorion*, 7 N. H., 475; *Levy* v. *McCarty*, 6 Peters, 102; *Spratt* v. *Spratt*, 4 Peters, 393; *Moers* v. *White*, 6 Johns' Ch., 360; *People* v. *Conklin*, 2 Hill, N. S., 69; *Brown* v. *Sprague*, 5 Denio, 545; and *Jackson* v. *Adams*, 7 Wend., 368.

These authorities, it would seem, entirely overthrow the portion of the opinion in 30 Texas, above quoted, that "in order that the government may complete its title by escheat where there are no heirs, the government must do some act of its own to manifest such claim of title; for it is the act of the government, coupled with

the operation of law, that constitutes this title by escheat."

On page 586 of this opinion of *Sabariego* v. *White*, 30 Texas, Mr. Justice LINDSEY says:

"The rights of the daughter Pilor accrued under the Spanish law."

I need not discuss the question, or present authorities to show that, if she took her mother's estate at all, it must have been under the laws of Texas, where the land was situated, and could not have been under the laws of a foreign country.

To evade the force of the rule of the common law, that an alien cannot inherit from an alien, he says, further, on page 586, and following the above-quoted paragraph, that "her rights were vested, *eo instanti*, upon the emanation of the grant to her mother. By the law of Spanish succession, her right to the inheritance of four-fifths of the estate was contemporaneous with the investiture of the mother with the title."

In the year 1842, when the mother of Pilor died, she, her husband, and mother were citizens of the Republic of Mexico, and had been from a time anterior to the declaration of Texan independence in the year 1836, and Pilor and her husband have ever since continued to be citizens of Mexico.

It is not assumed that, under our Texas laws of succession, under which Mrs. Sobariego must have taken, if at all, there was any such principle as that stated by the Court, that the right of an heir accrued at the time the ancestor was vested with title. Our rule is, that the heir takes at the death of the ancestor, and not before his death. The Justice asserts a principle of what he calls Spanish law, and comments on it without quoting the text of that law, and without giving his authority for it.

And the principle he asserts, in the sense in which he asserts it, will hardly fail to arrest the attention of this Court as extraordinary. He also discusses it without reference to the previous decisions of the Supreme Court of Texas, in which an entirely different doctrine was held by very learned and able judges on the same question; and it is fair to assume that, as he did not notice these previous opinions, his attention was not called to them, and that he did not know of their existence.

On this subject, the attention of this Court is specially called to the case of *Lee* v. *Smith*, 18 Texas, 141, in which (pp. 143, '4) it is said: "The proposition attempted to be maintained rests upon the supposed principle that, under the civil law and the laws of Spain, the ancestor and the heir were, in effect, the same person; that the estate did not properly descend upon the heir, but continued the same, with its rights, duties, and obligations; that during the life of the ancestor the heir had such a vested right in the succession as could not be divested by acts of legislation, or, as in this case, by law and naturalization imparting to others the right of heirship."

On page 144 of this opinion the Court says: "For the present, we can only express the opinion that the right of heirship depends on the *status* of the person claiming at the time of the decease of the person whose estate is claimed; that although, in some respects, there exists the fiction at civil law that the heir and the ancestor are the same person, yet the heir, during the life of the ancestor, has no such vested right in his property as cannot be affected or divested by act of legislation which, prior to the death of the ancestor, changes the order of descent and vests it in others." And the Court adds: "In other words, the *status* of heirship is fixed by the law in force at the death of the ancestor, without reference to the *status* at any other period."

In the case of *Hamilton* v. *Flinn*, 21 Texas, 713, the doctrine of the above case of *Lee* v. *Smith* is fully sustained by a reference to common and civil law authorities, and the Court hold that "forced heirs, as they existed formerly, had no rights in the property of an ancestor which might not be defeated by a change of the law."

These two opinions were delivered by Chief Justice HEMPHILL, supported by able associates on the bench, and without dissent; and no one who has occupied the supreme bench of Texas would consider it offensive when I say it was the common judgment of the bar of the State that, in this class of cases, he was the most learned judge that we ever had.

In this case of *Sabriego* v. *White*, 30 Texas, on page 586, Mr. Justice LINSEY assumes, if I understand his reasoning, that, in consequence of the passage of a law of forced heirship by the Congress of Texas of the 18th December, 1837, and of another act of a similar kind, on the 28th of January, 1840 (which were repealed, however, by the act of January 24th, 1856), the civil law of forced heirship was continued in force. How it could have been concluded that such could have been the case, after the adoption of the common law in 1840, and after the passage of statutes regulating the descent and distribution of the estates of deceased persons, by the Congress and Legislature of Texas, which furnished the sole rule on this subject, it would be difficult to understand. It seems to involve the absurdity of assuming that our statutes of forced heirship carried with them all the incidents of forced heirship under the civil law previously in force; and make it still worse by the assumption that a foreign heir can inherit real property in Texas under the laws of another country.

It was upon such reasoning as this, and upon such a

state of facts as is given in this case, that this opinion, page 588, expressly overrules the opinion of the Supreme Court of the United States in the case of *McKinny* v. *Sabiego*, 18 Howard, 235, and disregards the decision of the Supreme Court of Texas in the case of *White* v. *Sabariego*, in 23 Texas, 243.

On the question of the weight of authority to be allowed the case of *Scrimpf* v. *Sittegast*, 35 Texas, 323, reference is made to the authorities and reasoning above presented in relation to the case of *Sabariego* v. *White*, 30 Texas, 576, with a reference to the following additional authorities to meet the material facts of this case: "An alien cannot take by descent where the ancestor dies after preliminary declaration of intention to become a citizen, but before actual naturalization." *Fass* v. *Crisp*, 20 Pickering, 121; *McDonald* v. *Richards*, 1 McCord, 187; *Eldon* v. *Dal.*, 6 Blackford, 341. Similar doctrine is held in the Supreme Court of the United States in *Bright's Lessee* v. *Rochester*, 7 Wheaton, 535. The decisive point in that case is thus announced by Chief Justice MARSHALL:

"James Dunlap, therefore, if he continued an alien, continues liable to all the disabilities of alienage, one of which is an incapacity to transmit lands to heirs; consequently when he died the next of kin could take nothing by descent."

The attention of the court is also called to the fact that, in this case, Sittegast, the alien ancestor, had removed from Prussia to Texas, and made his declaration of intention to becomo a citizen of the United States; had bought a tract of land, and died in the year 1853, leaving children, but without having become a naturalized citizen. At that time there was no law of Texas enabling one to hold lands who had only declared his intention to become a citizen but had not been naturalized, and the court could only hold him to be entitled to hold and

transmit real property upon a question of public policy and without law. It is submitted that the court could only expound the laws enacted by the Legislature, and could not rightfully adopt and enforce a policy, however wise and beneficent, which the Legislature had failed to adopt. And to remedy the evil, and as evidence that the Legislature understood the state of the law on this subject, and that no such law was then in existence, on the 13th of February, 1854, the Legislature passed "an act to define the civil rights of aliens," which, among other things, provided that, "Any alien, being a free white person, who shall become a resident of this State, and shall, in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this State in the same manner as if he was a citizen of the United States." (Pasch. Dig., art. 47, p. 106.)

If this had been the law when Sittegast died his heirs could have inherited the land sued for in this case. As the law was at the time of his death, it is submitted they could not take land in Texas from him by inheritance. And it is respectfully submitted that this case cannot be received as authority, upon its facts, under the laws of Texas in accordance with sound legal principle and just interpretation; and that the rights of others ought not to be sacrificed on account of the mistake made by the court in this case.

In this case, in 35 Texas, *Settegart* v. *Scrimpf*, pp. 342 and 343, the Court refers to the case of Martin Koszta, as discussed by Secretary Marcy, (Ex. Doc., 1st sess., 33d Congress,) to support their view of the law. This Court need not be reminded that that controversy was about the political *status* and rights of aliens who had declared their intention to become citizens of the United States, and about the doctrine and right of expatriation, and

had no sort of relation to their legal rights to property or of inheritance under the laws of the United States or of any State in the Union.

It ought also to be noted that Mr. Justice LINDSEY, in the case of *Sabariego* v. *White*, 30 Texas, 588, and Mr. Justice WALKER, in *Settegast* v. *Schrimpf*, 35 Texas, 344, quoted and discussed section 14 of the act of the Texas Congress of January 28th, 1840, "to regulate the descent and distribution of intestate's estates," which is as follows:

"In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien; and every alien to whom any land may be devised or descend, shall have nine years to become a citizen of the Republic and take possession of said land, or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the Government." (Pasch. Dig., art. 44, p. 105.)

Mr. Justice LINDSEY says, in construing this section, p. 588, that "this provision of law shows, beyond all controversy, that the common-law rule, that an alien cannot cast descent upon alien, was wholly inapplicable to the Republic of Texas." And on this assumption, he expressly overruled the case from Texas, decided by the Supreme Court of the United States. (18 Howard, 235.)

And Mr. Justice WALKER, in construing the same section in *Settegast* v. *Schrimpf*, 35 Texas, 344, says, after quoting the section, that "this, as Mr. Justice LINDSEY has said, indubitably shows that the common-law rule, that an alien cannot cast descent upon an alien, was totally inapplicable to the State of Texas."

It will be seen by an examination of these opinions, that neither of the Justices appear to have examined its history, and the construction given to its language in

the English and American courts; and that both of them have fallen into the error of supposing it provides for the casting of descent *by an alien to an alien*, instead of regarding and giving the proper effect to the words of the statute—" any ancestor *through whom he derives his descent from the intestate.*"

It is respectfully submitted that this act was not passed for the benefit of aliens, as is supposed in these two decisions, but for the express benefit of citizens; that is, that descent may be cast by a citizen capable, under the laws of Texas, of casting descent; upon a citizen capable, under the laws of Texas, of taking by descent; and that it shall be "no bar" to this right, that the descent passes *through* an alien who, under the laws of Texas, can neither cast descent nor take by descent. All of our previous adjudications show this. Most clearly this statute was intended to preserve the policy of the law against aliens holding lands; but at the same time it was intended that a citizen relative might inherit from a citizen ancestor, though he might have to make his pedigree through a mediate alien ancestor.

This statute is a re-enactment of the English statute of 11 and 12 William III, c. 6. It is the same as the act of Virginia of 1785, Revised Code, 1819, Descent, p. 357, and was in force in Kentucky, which was separated from Virginia afterwards. The same in Maryland, New York, and other States; yet no such construction has ever been put on the English or American statutes as that first advanced by Mr. Justice LINDSEY.

In Blight's *Lessee* v. *Rochester*, 7 Wheat., 535, which arose in Kentucky, Chief Justice MARSHALL, familiar as he was with Virginia and Kentucky laws, decided directly against such a construction without alluding to the clause of the statute, when it was necessary that the decision should have been otherwise, if such was truly the meaning and design.

The construction of those statutes has been directly under discussion in several cases, yet no such view as that taken in these two cases has ever been taken or advanced. *Johnson* v. *Sanders*, 2 Leigh., 109; *Jackson* v. *Green*, 7 Wendell, 333; *Jackson* v. *Fitzsimmons*, 10 Wendell, 1; *Levy* v. *McCartee*, 6 Peters, 102; *McCreery* v. *Summerville*, 9 Whet., 354.

But, aside from these views, the reasoning of the Court in *McKinny* v. *Sabariego*, 18 Howard, 239, is so clear and convincing that it might be relied on as giving the true construction of this section.

But, leaving out of view the legislation under the government of the Republic and State of Texas, it will be seen that the decision by Justice LINDSEY in 30th Texas, and that by Justice WALKER in 35 Texas, cannot be maintained an authority, because an alien could not take and hold under the Mexican law.

In the latter opinion, Justice WALKER cites a statement from Escrieche, in the decision made by the Chief Justice in *Yates* v. *Iams*, 10 Texas, 168; and Justice WALKER approves that statement as the opinion of Chief Justice HEMPHILL, "that a foreigner, whether transient or domiciliated, could dispose of his property by contract *inter vivos*, or by will; and a devise could be made to foreigners or aliens, as well as to natives. So, also, if a foreigner died intestate, his property was not subject to confiscation, but descended to his right heirs, though they were aliens or foreigners; and that the right *albana* (that is, the right of escheat) does not exist under the laws of Spain." And Mr. Justice WALKER adds: "This was certainly a much more liberal and humane method of treating the rights of foreigners than that adopted by the common law, for by common law an alien could not maintain an action for the recovery of real property." (35 Texas, 341.)

Chief Justice HEMPHILL, in this case of *Yates* v. *Iams*, 10 Texas, 171, says: "If this be the law—and Escrieche is very high authority—the right of a foreign heir to succeed to real property in Spain cannot be questioned." He then discusses the doctrine attributed to Escrieche, and adds that "this might be intelligible if all the laws and their received construction were before us. As it stands, it is incomprehensible." *Ib.*, pp. 171 and 172. And in this case, as will be seen by an examination of it, his reasoning and conclusion are exactly the reverse of what Justice WALKER supposes.

In the case of *Halliman* v. *Peebles*, 1 Texas, 678, which was a case decided under Mexican law, abandonment of the country was held, without office found, *ipso facto* to vacate the grant of Halliman. In *Yates* v. *Iams*, above referred to, which turned on Mexican law, it was held that an alien heir did not inherit from a citizen holding title to land. These cases are followed by numerous others, all showing the stringent rules of Mexican policy, even against foreigners who had been invited and settled in Texas as colonists.

"An alien could not take or hold under the Mexican law, and it was error to strike out a plea that the plaintiffs were aliens when they purchased." *Clay* v. *Clay*, 26 Texas, 30; and *Lacasta* v. *Odum*, Ib., 459.

"Aliens could not inherit, under Mexican law, prior to the constitution of the Republic." *Hornsby* v. *Bacon*, 20 Texas, 559.

"It is too well settled, by repeated decisions of this court, to be longer regarded as an open question that at the period of the death of Charles Baird (1838), his heirs, being aliens, could not inherit his estate." *Blythe* v. *Esterling*, 20 Texas, 568.

"The right of an alien heir to claim land must be tested by the laws anterior to the constitution of the

Republic of Texas, and by them such right cannot be sustained." *Middleton* v. *McGrew*, 25 Howard, 48 and 49, citing Mexican Ordenos y Decretos, Vol. IV, 155, and various Texas decisions.

These authorities are supposed to be conclusive on this point.

However much the influences of modern commercial intercourse and civilization may have mitigated these rules for the purpose of commerce and trade, and with reference to personal property, the great fact stands, that, among all the civilized nations of the world, there is not one which allows aliens to take and hold real property as a citizen may do. A rule so important, and of such universal prevalence, must rest upon reasons of State, and of public policy, of a very substantial nature. And we are not without historic illustrations of the danger of allowing aliens to become owners of the soil. This was one of the means used for the subjugation and overthrow of Poland by Russia. Such a right, in view of the vast accumulations of capital in a few hands, as we have it in modern times, might be used to withdraw from a country its revenues, to cripple its resources, and, if not to weaken the allegiance of a people, certainly to endanger liberty by the power of exaction and of oppression. The effects of non-resident land ownership are painfully illustrated in Ireland, by the poverty and oppressions suffered by that people from this cause. In our own country where lands have been granted to great corporations by the many millions of acres, while these same corporations owe millions of money to foreign capitalists, we may see how, if aliens were permitted to take and hold lands as citizens may, vast bodies of land in this country might fall into foreign hands to be used and disposed of under influences, and possible for purposes, alien to American interest, and detrimental to the

prosperity of the country. But whatever the reasons for this policy may be, it is firmly established, with the universal sanction of all nations for ages past; and in this country can only be changed by legislation—by the adoption of a different policy by the law making power.

The State of Texas in the plan and powers of her Provisional Government, by the constitution and laws of the Republic, by the constitution and laws of the State, and by the decisions of her courts, has steadily maintained the doctrine that aliens cannot take and hold lands as citizens can, but only to the extent, and for the limited and specified purposes provided in the constitution and laws. And none of these permit an alien heir to take and hold land in Texas from an alien ancestor.

III. The 4th assignment of error goes to the admissability in evidence for the defendants in error of the original grant from the government of Coahuila and Texas to Jose Ygnacio Aguelera for the eleven leagues of land sued for, as an authenticated and recorded instrument under the laws of Texas. (Record, pp. 60 to 71.)

The ninth section of the act of the Texas Legislature entitled "An act to provide for the registration of deeds and other instruments of writing," approved May 12th, 1846, is as follows:

"When the subscribing witnesses to any instrument of writing may be dead, or their place of residence unknown, or when they reside out of the State, an affidavit thereof may be made and attached to such instrument; after which it may be proved for the purpose of being recorded, by the evidence of the handwriting of the grantor or person who executed such instrument, and at least one of the subscribing witnesses, which evidence shall consist of the deposition of two or more disinterested persons, in writing, attached to such instrument;

and the officer taking such proof shall make a certificate thereof, sign and seal the same with his seal of office." (Note 1102 to Art. 5009, Pasch. Dig., p. 839.)

The affidavit that the residence of the witnesses, Secundina Rodriguez and Man'l Terez, to the testimonio (Record, p. 68), was unknown, is as follows:

"THE STATE OF TEXAS, }
Galveston County. }

Personally appeared before me, E. P. Hunt, a Notary Public in and for the county of Galveston, in the State aforesaid, this 2d day of May, 1857, R. D. Johnson, who, having been by me duly sworn according to law, deposes and says that the residence of Secundina Rodriguez and Man'l Terez, the witnesses to the annexed instrument, is unknown to him, said deponent." (Signed and sealed by the Notary.)

Is this affidavit a compliance with requirements of the statute? Who is R. D. Johnson, the deponent? What reason was there why R. D. Johnson should know the residence of these witnesses? He was not the owner or part owner of the land. He was not the agent of the owners; had no connection with it; was a mere stranger, a voluntary interloper, without interest; does not show that he ever had known these witnesses, or that he had had any interest in knowing them. The testimonio was executed and witnessed at Nacogdoches, Texas; and the Court will take judicial notice of the fact that Galveston is not less than two hundred miles from Nacogdoches. It may have been, and no doubt was, true, that R. D. Johnson did not know these witnesses; and it might have been equally true if it had been sworn to by any one of five hundred thousand people in Texas, or by any one of a like number in Louisiana or New York. But it is submitted that such a deposition, by one who had no interest in knowing these witnesses; who did not re-

side in the country where they had lived; who did not profess to have had any means of knowing them, or to have made any inquiry about them, is a mere formal paper, without substance or meaning, or the pretence of substance or meaning in it, can have, and is entitled to have, no legal effect, and is not a compliance with the requirements of the statute.

"The *degree of diligence in the search* for the subscribing witnesses is the same which is required in the search for a lost paper—the principle being the same in both cases. It must be a strict, diligent, and honest enquiry and search, satisfactory to the court under the circumstances of the case. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; and enquiry should be made of his relatives and others who may be supposed to be able to afford information; and the answers given to such enquiries may be given in evidence, they being not hearsay, but parts of the *res gestae*. If there is more than one attesting witness, the absence of them all must be accounted for, in order to let in secondary evidence." Greenleaf's Ev., fifth edition, vol. 1, § 574 and § 558. See, also, *Clarke* v. *Courtney*, 5 Peters, 319; *Rhodes* v. *Riggs*, 1 Cr. C. C., 87; *Smith* v. *Carolin*, *Ib.*, 99; *Gomes* v. *Lovel*, *Ibid*, 183; *Whaun* v. *Hall*, 2 Cr. C. C., 1; *Simpson* v. *Johnson*, *Ibid*, 107: *Broadwell* v. *McClish*, 1 Cr. C. C., 4.

The execution of a deed not properly authenticated for record, to which there are subscribing witnesses, cannot be proved by one not a witness, a party thereto, until affidavit has been made, not only that the residences of the subscribing witnesses are unknown, but that diligent enquiry has been made for them. See *Sample* v. *Irwin*, 45th Texas, 567; *White* v. *Holliday*, 20th Texas, 679; *Craddock* v. *Merril*, 2d Texas, 494.

As these authorities show there was not a sufficient

predicate laid for the introduction of proof "of the handwriting of the grantor or person who executed the instrument, and, at least, one of the subscribing witnesses," we might here rest the question raised by this assignment of error; but, upon inspection of the depositions of Taylor and Edwards, made before the notary, Hyde (Record, p. 70), while they testify to the signature of Aldrite, they do not pretend to speak of the signatures of either of the subscribing witnesses; and, if the proper predicate had been laid, they must have proven the handwriting of one witness, as well as that of the maker of the instrument, to have secured the introduction of this title (testimonio) in evidence as a recorded instrument.

And when it is remembered that now, more than forty years after Texas became an independent Republic, these grants for vast amounts of land, either discovered or manufactured, are constantly making their appearance, and purporting to come from Mexico, under circumstances, often, of very great suspicion as to their genuineness, and producing litigation and disturbing citizens who have long resided on their land, under titles either from Mexican or Texas authorities, the necessity for enforcing the rules of evidence, so as to guard against fraud and forgery, will be understood.

It was upon these two depositions that the pretended title of the defendants in error was put on record, and offered in evidence after the trial below as a recorded instrument. The proof of the execution of the instrument being insufficient, the record under it is a nullity, and constituted no notice to any one of the claim of right of defendants in error to the land described in the deed. (Testimonio.)

"But this doctrine, as to the registration of deeds being considered notice to all subsequent purchasers, is not

to be understood of all deeds and conveyances, which may be *de facto* registered; but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a nullity; and, then the subsequent purchaser is affected only by such actual notice, as would amount to fraud." Story's Eq. Jur., Vol. 1, § 404, and authorities therein referred to. See, also, *Sigourna* v. *Larned*, 10 Pick., 72; *Frost* v. *Beekman*, 1 Johnson's Ch., 300; and *Baldwin* v. *Richardson*, 33 Texas, 32 and 33.

And it may not be improper to mention that R. D. Johnson, who made the affidavit of a want of knowledge of the residence of the witnesses to the testimonio, was so careless, or knew so little of them that, in his affidavit, he gives the name of the witness Secundino Rodriguz, (Record, p. 68,) as Frondino Rodrequez, (Record, p. 70,) wholly mistaking the Christian and sir name of the witness about whom he was testifying.

IV. The 5th bill of exceptions goes to the sufficiency of the certificate of the United States consul at Mexico to prove, for record under the laws of Texas, the testimonio of an act of sale by José Ygnacio Aguilera before Miguel Diez de Bonilla, a notary public of the city of Mexico, dated at the city of Mexico March 10th, 1836, purporting to convey title to the land sued for to Anna Matilde Messieu, infant daughter of Victor Messieu. (Record, pages 71 to 74.)

It will be observed that the certificate of W. S. Parrot, the United States consul, (Record, p. 73,) is dated the 19th of March, 1836. This Court will take judicial notice that the independence of the Republic of Texas which severed it from Mexico, was declared on the 2d of

March, 1836, and that at that time, and on the 10th of March, when this conveyance purports to have been made, and on the 19th of March, when the consular certificate purports to have been made, the Republic of Texas and the Republic of Mexico were engaged in flagrant war. It is not necessary to examine the question of the authority of the United States consul at Mexico at that time to probate for record such an instrument in any State within the United States. If he had any such authority, it did not extend to the Republic of Texas—not then one of the States of the Union.

The fourth section of "An ordinance and decree for opening the several courts of justice, appointing clerks, prosecuting attorneys, and defining their duties," &c., passed by the Consutation at San Philipe de Austin, on the 22d of January, 1836, provides that the first judge of each municipality shall have power "for executing notarial acts." (Page 136, Ordinances and Decrees, Provisional Government.) This was a continuance of the system which prevailed in the country when under Mexican rule. Under that system, the original act made before the judge, alcalde, or notary, called the protocol itself, constituted the record, and remained with the officer before whom it was executed, and the party for whose benefit it was executed received from the officer a certified copy of the protocol, called a testimonio, or second original, to serve him as a title; so that at the time the act of sale in question purports to have been made, and at the date of the certificate of the United States consul in Mexico, there were no laws in Texas for the registration of such instruments, in the sense of our laws of registration.

The 35th section of the act of the Congress of the Republic of Texas. entitled "An act to organize the inferior court, and defining the powers and duties of the same,"

passed December 20th, 1836, provides that "the clerks of the county courts shall be the recorders of their respective counties, and it shall be their duty to record all deeds, conveyances, mortgages, and other liens, and all other instruments of writing required by law to be recorded in their offices, which are presented to them: *Provided*, one of the witnesses, of the number required by law, shall swear to the signature of the signor, or he himself acknowledge the same; which shall be certified by the recorder and form a part of the record; and all deeds, conveyances, mortgages, and other liens shall be recorded in the county where the property is situated." (Pasch. Dig., art. 4973, p. 832.) This act was a departure from the old system of notarial acts, and the adoption of the present system of the recording of such instruments, when properly proven, for record. And it was our first law providing for the registration of deeds, &c. It will be seen that this conveyance could not have been recorded under that law on the certificate of the United States consul. It purports to have been recorded in Freestone County, Texas, on the 8th of August, 1870, (Record, pp. 73 and 74,) and in Anderson County, Texas, on the 7th of October, 1870. (Record, p. 173.)

The 11th section of the act of the Legislature of Texas, "to provide for the registry of deeds," &c., of May 12th, 1846, provides that they may be so registered on the certificate, under seal, when acknowledged or proven without the United States, "before some public Minister, Charge d'Affaires, or Consul of the United States." Pach. Dig., art. 6011, p. 839. And there is a similar provision in the act of Nov. 13th, 1866. (Pach. Dig., art. 7,413, p. 547 *b*.) But these acts, in this respect, operate prospectively, and there is no act which makes a certificate of this kind, while Texas was a Republic, valid. But, if there was, this consular certificate

does not purport to be to the acknowledgment of the maker, or of the witness to the conveyance of their signatures, so as to probate it for record. The Consul only certifies that the signature of the Notary Public, Bonilla, was known to him, and that Bonilla was at the time of its execution a Notary Public of the City of Mexico. These are not the facts he must certify to in order to prove the execution of the instrument for record. For that purpose, under the registration laws of Texas, he must have certified that Bonilla *acknowledged* the execution of this instrument, or that one of the witnesses to it acknowledges his signature to it as a witness. There is no law of Texas authorizing a United States Consul to certify a record so as to admit it to record. And it will not be contended before this court that there is such a law.

It is therefore submitted, that said conveyance ought not to have been permitted, by the Circuit Court, to be read to the jury as a properly authenticated and recorded instrument.

V. The 6th assignment of error goes to the admissibility of the testimony of E. A. Mexia, a witness for the defendants in error, to prove an examined copy of this act of sale. (Record, pp. 74 and 75.) We submit that the court erred in permitting this witness to prove the laws of Mexico in force in 1873. (See *Bryant* v. *Kelton*, 1st Texas Report, page 436.)

See 1st vol. Paschal's Digest, art. 3,712, which reads as follows:

"The printed statute books of this State shall be evi-
"dence of the private acts therein contained, and the
"printed statute books of the several States and Terri-
"tories of the United States purporting to have been
"printed under the authority of such States and Terri-

"tories, and a certified copy, under seal of the Secretary "of this State, of any act or resolution contained in the "printed statute books of any State or Territory of the "United States purporting to be printed under the au- "thority of such State or Territory, and copies of pri- "vate bills certified to by the Secretary of State and "attested by his seal of office, which is deposited in the "office of the Secretary of this State, shall be evidence "in like manner."

Thus it will be seen that Texas requires the best testimony as to the laws of the different States and Territories of the United States, viz: the production of such laws. As to laws of foreign governments, Texas has left the mode of making proof thereof to the common law. The Congress of the United States have not legislated upon this subject, and the common law rule must govern as to the manner of making proof of foreign laws. Mr. STORY, in his excellent work on Conflict of Laws, § 639, says: "The general principle is that the best testimony or proof shall be produced which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony behind and attainable by the party who offers it. This rule applies to the proof of foreign laws as well as of other facts."

In section 640 the same author says: "Generally speaking, authenticated copies of the written laws, or of other public instruments of a foreign government, are expected to be produced, for it is not to be presumed that any civilized nation will refuse to give such copies, duly authenticated, which are usual and necessary for the purposes of administering justice in other countries. It cannot be presumed that an application to a foreign government to authenticate its own edict or law will be refused; but the fact of such refusal must, if relied on,

be proved. *But if such refusal is proved, then inferior proofs may be admissible.*"

We submit that the Court, in permitting the witness, Mexia, to testify as to the laws of Mexico, as mentioned in 6th bill of exceptions, pages 74 and 75, was in error, the witness having failed to lay any predicate for secondary evidence upon the subject; and we submit that the Court erred in permitting said witness to testify in reference to such laws.

Said 6th bill of exceptions further shows that the Court permitted said witness to testify that he had examined the original act of sale of said eleven leagues of land, made by Jose Ygnacio Aguilera to Anna Matilda Messieu, and remaining on the notarial record of said notary, Bonilla; that he was well acquainted with the handwriting of said Jose Ygnacio Aguilera, Victor Messieu, and said notary, Bonilla, whose several signatures appear to said original act of sale in said notary's archives; that their said several signatures were genuine, and that they are all now dead; and further stated that he knew nothing of or about the witnesses named as witnesses to said act of sale, and did not know whether they were living or dead. We submit that it was error to allow this secondary evidence to prove said act of sale. The second original mentioned in 5th bill of exceptions was before the court, and had, we think, been erroneously admitted as evidence by the Court; and the defect in the proof as to the execution of the said second original could not be supplied by introducing the examined copy mentioned in 6th bill of exceptions. The second original of the act of sale being before the Court, the common law rule required that its execution should have been proven by the subscribing witnesses to said act of sale. The witness, Mexia, who was agent for defendants in error, does not know them; does not know

where they live; does not know whether they are living or dead, and yet the Court accepts his evidence, which is secondary in its character, to prove that the protocol which is not produced, is in the City of Mexico, &c.

The protocal or second original, with the original signatures of the notary and attesting witnesses, is before the Court. Mr. Greenleaf, in his 1st vol. on Ev., § 569, says: "The instrument, being produced and freed from suspicion, must be proved by the subscribing witnesses, if there be any, or at least by one of them. Various reasons have been assigned for this rule, but that upon which it seems best founded is, that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction. The party to whose execution he is a witness is considered as invoking him as the person to whom he refers to prove what passed at the time of attestation. The rule, though originally framed in regard to deeds, is now extended to every species of writing attested by witnesses."

The rule, that the subscribing witness to the Notary's act of conveyance must be called to prove the execution of the instrument, is abundantly sustained by the decisions of the Supreme Court of Texas, and this rule is held to apply also to the testimonio issued by the late government of Coahulia and Texas. See *Smith* v. *Townsend*, Dallam Digest, page 570; *Houston* v. *Perry & Williams*, 6th Texas, 562, 7th Texas; *Herndon* v. *Casiano*, 332 Id.; *Paul* v. *Perez*, 341; *Hatchel* v. *Conner*, 30th Texas, 109. We submit that the court erred in receiving as evidence the said examined copy, it being secondary evidence, because the 5th bill of exceptions show that the original testimonio was before the court, and had been admitted in evidence without any proof whatever as to its execution, but was received as an authenticated and

recorded instrument under the laws of Texas. We submit that, under the laws of Mexico, the testimonio was authenticated, and anywhere within the Republic of Mexico it was so authenticated as to be full of proof, and if Texas were still a part of Mexico it would be proof. But as the civil law is not the law of Texas now, but the common law furnishes the rules of evidence, the said authentic act of conveyance of said Notary is no longer *per se* evidence of its execution.

Counsel for defendants in error in the court below invoked the rule laid down in the case of *Watrous* v. *McGrew*, 16th Texas, 507, to sustain the action of the court, yet we cannot see the application of the principles of that case to this.

The Supreme Court of Texas say "An authentic act done before a Notary Public in Louisiana in 1838, for the conveyance of land situated in the Republic of Texas, may be proved by copy authenticated under act of Congress of the 27th March, 1804." Such proof of public records of one of the States of the Union is sufficient before the courts of the United States and of the States, but such proof is not sufficient to authorize the record of such documents under the registration laws of Texas. Each State has its own peculiar registry laws, and each State has the right to adopt its own legislation upon this subject according to its views of public policy. An instrument, such for instance as a will to be recorded in Texas, must be proven and authenticated according to the laws of Texas, and cannot be admitted to registration in New York on the proof required in Texas, but must be admitted to record according to the requirements of the registry laws of the State of New York. The acts of Texas courts in reference to the will may be authenticated under the acts of Congress above named, so as to establish before the courts of New York State or any

other what the Texas courts had done in relation to the will.

It is submitted that the 6th assignment of error is well taken.

VI. We contend that the 7th assignment of error is well taken. (See 7th bill of exceptions, p. 75.) Mr. Kent, in his Commentaries, 7th edition, page 178, 1st vol., says: "To complete the right of property, the right to the thing and the possession of the thing must be united. This is a necessary principle in the law of property in all systems of jurisprudence. There must be both the *jus in rem* and the *jus in re*, according to the distinction of the civilians, and which Barbeyrac says they borrowed from the canon law." According to the Spanish or civil law, there can be no title to land without actual livery of seizin. At the date of conveyance mentioned in 7th bill of exceptions, such an act as that of actual livery of seizin was impossible, as the Court must recognize and know the state of war then existing between Mexico and Texas. And if it be contended that there was a constructive delivery of possession, the reply is, that a constructive delivery can only be allowed where an actual delivery was possible; and as no actual delivery could have been made, on account of the existence of flagrant war between Texas and Mexico, there could have been no constructive delivery.

As to the 8th assignment of error, it is submitted that the Court erred in permitting to be read the affidavits therein mentioned, over the objections of plaintiff in error, as evidence before the jury—

1st. Because they were not filed in the court three days before the commencement of the trial of this cause.

2d. Because they were not filed one day before the trial commenced.

3d. Because said affidavits were and are mere *ex parte* affidavits, made without the knowledge of plaintiff in error, and not taken by virtue of any commission issued from the Circuit Court of the United States for Texas, nor by authority of any law of the State of Texas or of the United States, so as to furnish any legal evidence in the case of the correctness of the copy, and it does not appear that they were taken to be used in this case.

It is submitted that said 8th assignment is well taken, without further argument than a reference to Pasch. Dig., art. 3716.

It is submitted that the 9th, 10th, and 12th assignments of error were well taken; that the Court erred in excluding, as evidence of title, the deed from E. M. Dunn and his wife Ann and plaintiffs in error, because the internal-revenue stamps thereon had not been cancelled. It has been decided by rhe Supreme Court of Texas, *Jacobs* v. *Cunningham*, 32 Texas, 716, that "the mere failure to cancel the revenue stamp upon an instrument required by law to be stamped, as it does not defraud the Government, is not invalid as an instrument of evidence."

Even the omission to stamp an instrument, where it is the result of an innocent mistake, will not prevent the instrument from being used in evidence, if the party offering it will offer and cancel the necessary stamps in open court, after objection has been made. (*Dailey* v. *Coker*, 33 Texas, pp. 816 and 817.)

The Court ought to have allowed the proof offered by plaintiff in error of the execution of the deed by the subscribing witness, and ought also to have allowed plaintiff in error to cancel the revenue stamps in open court, as he offered to do. And see the case of *Corry National Bank* v. *Rouse.*, as quoted in 3d Internal Revenue, Rec-

ord, p. 31, where it is said: "the want of proper cancellation does not render the instrument void, but merely subjects the party offending to a penalty of $50." And see the whole case of *Corry National Bank* v. *Rouse*, 3d Pittsburg Reports, p. 19—a short case. In this case it is also held that "no instrument is rendered void by the omission of the requisite stamp, unless it is done with intent to evade the provisions of the act." In *McGovern* v. *Hoesbock*, 53 Pennsylvania, p. 179, it is held by the court that "there is no evidence that the stamp was omitted with any design to evade the act of Congress; and it is only instruments that are made with that intent that are void." To the same effect see *Holyoke Machine Company* v. *Franklin Paper Company*, 97 Mass., 150, and *Vorebeck* v. *Roe*, 50 Barbour, 302. See also *Blount* v. *Bates*, 40 Alabama, 474.

It is also submitted, under the 10th assignment of error, that the court erred in excluding as evidence the patent from the State of Texas, No. 357, issued on the 25th of November, 1854, to Robert S. Patton, for two-thirds of a league and a labor of land, which embraces the 153 acres of land claimed by plaintiff in error; and also in excluding the deed from R. S. Patton to Thomas G. Kimbrough, dated December 30th, 1854, purporting to convey all of the land described in said patent and recorded in Anderson county on the 1st of January, 1855; also patent No. 682, issued February 4th, 1857, to said Robert S. Patton, for 10 and a fraction labors of land, comprising said 153 acres, and such other part of said two-thirds of a league and labor as was not in conflict with Edward C. Harris's league, upon the motion of defendants in error, said patents and deeds having been previously read as evidence to the jury. This was done upon the ground that plaintiff in error had specially plead his title to the 153 acres of land, of the R.

S. Patton grant, when, in fact, he had not specially plead this title, and failing to show title in himself, that none of the muniments of title offered could properly remain in evidence.

This, we submit, was an error of the court resulting from a misapprehension of the pleading in the case, and misapprehension of the doctrine announced in the case of *Revirs* v. *Foot*, 11th Texas, 670. In that case the court says: "The only exception to this rule (rule that special "matter in avoidance of plaintiff's title must be specially "pleaded) is that made by the statute in favor of a defend- "ant who relies on the plea of not guilty to an action of "trespass to try title. By the statute Pasch. Dig., art. "3,235, it is provided that the defendant in this action shall "not hereafter be required to put in any other plea than "the one of not guilty; where, therefore, the defendant "does not plead specially, but relies on his right under "the statute, he must, of necessity, be permitted to give "in evidence special matter in his defence under this "plea. For it evidently was the intention of the statute "to give that right. But if he does not choose to rely "on his statutory privileges, but also pleads specially, it "may well be a question whether he should not be con- "fined in his evidence to the matter pleaded. There "would seem to be much reason for considering this the "correct rule of practice. For, by pleading specially, "the defendant gives notice of his defences, and the "plaintiff has a right to suppose he will rely on none "other, and ought not to be required to come prepared "with evidence to meet other defences than those which "the defendant, by his pleadings, has asserted as the "matters of defence on which he will rely."

It would seem that the court means to say that where a defendent pleads specially his title his proof must conform to his allegations, or otherwise there will be a vari-

ance in his proof, and it may be rejected and cannot be admitted under the plea of not guilty. But it is submitted that the above rule of variance could have been applied only to the muniments of title of plaintiff in error offered to support the title to the 1,845 acres of the Harris grant, which had been specially plead by plaintiff in error. The plaintiff in error nowhere in his answer specially plead his muniments to title to the 153 acres on the Robt. S. Patton grant, hence the rule of law was in full force as to this tract of land that plaintiff in error, under his plea of not guilty, could show a superior outstanding title in himself, or anyone else, as to the 153 acre tract covered by the Patton patent from the State of Texas, and we insist that the patent to Patton and the deed to Kimbrough having been admitted, should not have been excluded, but were proper proof under the plea of not guilty. These patents and deed showed an outstanding title, and one superior to that of defendants in error, according to the case of *Gibbean* v. *Mays*, 15th Texas, 410.

IX. It is contended that the 11th assignment of errors is well taken. (See 11th bill of Exceptions, pp. 79, 80 of Record.) It will be seen by the court, by examining the 1st named and copied instrument in the 4th bill of exceptions, pp. 60, 61, 62 and 63, that defendants in error introduced in evidence a certified copy of the original or protocol to Jose Ygnacio Aquilera, dated Nov. 27, 1833, to the eleven leagues of land in controversy, certified by the Commissioner of the General Land Office, and the Spanish Translator of said office as an archive of said office, the said copy having been made on the 22d August, A. D. 1873, and said protocol having for the first time been filed in the Land Office on the 14th day of July, A. D. 1873, and received from the hands of the Governor of Coahulia in the month of June or July, 1873, by the witness Mexia. (See page 80 of

Record.) It is submitted that, after if had been made to appear beyond dispute that the protocol was not, in fact, an archive of the General Land Office of Texas, but a document which Mr. Mexia had received from the Governor of Coahulia in the month of July, 1873, and which document was not made to appear to be an archive of the government of Coahulia, but the private property of Mr. Mexia, it was the duty of the court to exclude the certified copy which had been read to the jury.

As to whether the original might have been read upon proper proof there can be no question. In fact, the Court erred in permitting the copy to be used when there was no reason for not introducing the original. We deny most emphatically the doctrine that Mr. Mexia, the Commissioner of the General Land Office, and the Governor of Coahulia can, by their joint action, make any document an archive of the General Land Office of Texas.

Mr. Bovier, in his law dictionary, defines an archive to be an "ancient charter or title which concerns a nation, state, or community in their rights or privileges." So far as the proof goes, this document has no history beyond June or July, 1873. No witness testified to its existence beyond that period. Its existence prior to the 14th July, 1873, was unknown at the General Land Office. There is no law of Texas which required or made it the duty of the Commissioner of the General Land Office of Texas to file it in his office, or to keep it in his custody, or to hold it on deposit as a public document.

On the 14th December, 1837, the Congress of the Republic enacted "that it shall be the duty of every person or persons who may have in his or their possession or control any titles or documents whatever which relate to lands, and which, by the laws now or heretofore existing

in Texas, have been and are considered archives, to deliver the same to the Commissioner of the General Land Office, on his order, within sixty days after the final passage of this act." (See art. 70, Paschal's Dig.) See art. 71, which reads: "That the Commissioner of the General Land Office be entitled to and shall keep charge of the seal, and also that he be and is hereby entitled to and shall have custody and control of all books, records, papers, and original documents appertaining to the titles of lands heretofore and by the provisions of the law denominated archives; and that the said books, records, papers, and original documents shall become and be deemed the books and papers of said office."

The above is the only general legislation in Texas upon the subject of archives, and we submit that it was never intended by said law to authorize the Governor of Coahulia, in the year 1873, through Mr. Mexia, to furnish the General Land Office of Texas with archives, however ancient might be the date to such documents. This paper was in the hands of the Governor of Coahulia in June or July, 1873, and in one of those months was handed to Mr. Mexia. On the 3d day of June, 1872, Mr. Mexia, as the agent of defendants in error, authorized the institution of this suit. (See 2d page of Record.)

This document, if genuine, was the original proof of the grant of the land by the Governments of Coahulia and Texas to Jose Ygnacio Aguilera, of the land sued for. It had been placed in the custody of the agent of defendants in error after the bringing of this suit. It was in his power and under his control; why did he not file it in this suit or keep it in his custody? "A copy is inadmissible, unless the original be lost or destroyed, or beyond the power of the party to produce it." See *Haldeman* v. *Haldeman*, Hemp., 559. Did the private ar-

title may be recorded in the county in which part of said land lies." (Pasch. Dig., art. 4980.)

The act of the Congress of Texas of May 10th, 1838, for the modification of the above-quoted section is as follows:

"So much of the thirty-seventh section of an act entitled 'An act organizing the inferior courts and defining the powers and jurisdiction of the same,' as requires recording before the first of April, eighteen hundred and thirty-eight, approved twentieth December, eighteen hundred and thirty-six, be, and the same is hereby, repealed." (Pasch. Dig., art. 4981.)

In the case of *Gilbeau* v. *Mays*, 15 Texas, 413, it is held that this latter section only changed that of December 20th, 1836, as to the limited time in which the record was required to be made, and that it was still obligatory on the owners of such evidences of claim, lien, or title, to have them recorded, and subject to the same consequences, if not recorded, by the 40th section of the same act, as to any intervening rights of third parties, as imposed or declared. (Ib., 414 and 415.) And in *Ward* v. *McKinny*, 25 Texas, 258, it is held that this section may embrace Government grants.

The 40th section of the act of December 20, 1836, above referred to, is as follows:

"No deed, conveyance, lien, or other instrument in writing, shall take effect, as regards the interests and rights of third parties, until the same shall have been duly proven and presented to the court, as required by this act, for the recording of land titles. And it shall be the duty of the clerk to note particularly the time when such deed, conveyance, lien, or other instrument is presented, and to record them in the order in which they are presented." (Pasch. Dig., art. 4983.)

This section has been expounded in numerous cases

by the Supreme Court of Texas. (See Pasch. Dig., note 1092, p. 835.)

The 2d section of the act of the Texas Congress, of January 19, 1839, "The better to define the duties of recorders," is as follows:

"Copies of all deeds, *etc.*, when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." (Pasch. Dig., art. 4984.)

In the case of *Gilbeon* v. *Mays*, 15 Texas, above referred to, it will be seen that this section has direct reference to titles issued by the former government, like that of the defendants in error. And the court in that case say that "There is no doubt but that such evidences of title ought to be recorded." Ib., p. 414. And in the same case the court hold that the failure to record (where the archive is not in the Land Office), or to delineate the same on the county maps, will postpone them to junior titles derived from the government, and will place the locator, or his vendee, without notice, in the great class of innocent purchasers.

There is a legislative confirmation of the doctrine of the case of *Gilbean* v. *Mays*, above referred to, the 2d section of the act of the Texas Legislature of October 20th, 1866, "supplemental to and amendatory of an act entitled an act to regulate proceedings in district courts, approved May 13th, 1846," was passed; which is as follows:

"Titles to land which may have been deposited in the General Land Office subsequently to the time when the land embraced by such titles had been located and surveyed, by virtue of valid land warrants or certificates, shall not be received as evidence of superior title to the land, against any such location or survey, unless such

elder title had been duly recorded in the office of the County Clerk of the county where the land may have been situated, prior to the location and survey, or the party having such location and survey made had actual notice of the existence of such elder title before he made such location or survey." Pasch. Dig., vol. 2, art. 5825, p. 1194.

"It is within the undoubted powers of State Legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the junior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitations and their effect. Reasons of sound policy have lead to the general adoption of laws of both descriptions, and their validity cannot be questioned. (See 2 Howard, U. S. R., p. 613–15, Cond., pp. 231–2. And see 3 Peters, 290; and *King* v. *Elson*, 30 Texas, pp. 252–3.)

1. The defendants in error sought to avoid the effect of the principles presented in these charges, by proof by which they hoped to bring notice home to the plaintiff in error of their title, and to relieve themselves from the effect of the failure to deposit their title in the General Land Office, or to have it recorded in the county where the land was situated. There was no evidence that plaintiff in error, or any of those through whom he derived title, had any actual notice, at the times they respectively acquired their titles, of the existence of said grant to Jose Ygnacio Aguilera. The defendants in error, for the purpose of fixing on him constructive notice, introduced the abstract, found on p. 83 of the Rec-

ord, of lands which purport to have been granted before the 11th of June, 1830. This purports to be "Abstracts of sitios (leagues) and labors granted up to this date by the Government to several individuals by way of purchase, the original documents whereof remain on file in these archives, and the parties interested furnished with the respective testimonio (certified copy) for such purposes as may be expedient." It is dated "Leona Vicaria, June 11th, 1830," and signed "Santiago del Valla, Sec'y."

The first objection to this as evidence is that we know of no law requiring such an abstract to be made out, or which makes it an archive or record. There was no law or proof which shows why or how it was made or became an archive of the General Land Office of Texas. There was no proof of who Del Valla was, or of his official character, or of his official custody of this paper. It seems to have been a mere private memorandum, and there is no proof as to how or when it found its way into the General Land Office of Texas. It constituted no evidence of right to land known to the laws of Texas, nor, so far as we know, as known to the laws of Mexico. It designates no particular place at which any land is located, and would, under our laws, be no notice to any one of the existence and location of the grant claimed by defendants in error. It indicates that a grant had been made "to citizen J. Ygnacio Aguilera on the 22d of March, 1830, the original documents whereof remain on file in these archives, and the parties interested *furnished with the respective testimonio.*" (Record, p. 83.) If the heading of this memorandum states the truth, this could not have been the grant now claimed by the defendants in error. A *testimonio* of a grant like this is a certified copy of all the papers material to the grant, made out after the title is completed. By referring to the Record

of this case, pp. 65 to 68, the Court will see what the testimonio of the grant under which the defendants in error claim is. It is composed of a certified copy of the petition, the concession, the prayer for personal title on the Trinity or Narayolo Creek, the order of survey, the notes of survey, the order for the title to be issued, and the title of possession.

Now, all these things had to be done *before* the testimonio could be issued. The title of possession was given on the 26th of November, 1833 (Record, p. 68), and the testimonio was issued on the 21st of January, 1834. This could not, therefore, have been the grant made to Aguilera on the 22d of March, 1830, when it is alleged, in the heading of this abstract, "the parties interested" were "furnished with the respective testimonio."

2. The testimony of C. Pressler, draftsman in the General Land Office (Record, p. 84), shows that in the year 1841 there was no map of the grant, claimed by defendants in error, in the General Land Office. The grant under which plaintiff in error claims from the state of Coahuila and Texas to Edward C. Harris, was made on the 26th day of June, 1835. (See Record, p. 34.) The conveyance of this league of land by said Edward C. Harris to Lester Hotchkiss (Record, pp. 35 and 36), was made on the 9th day of June, 1840, after the enactment of the registration laws hereinbefore referred to. This, under those laws, postponed the title of prior date under which defendants in error claim, and gave to Hotchkiss and his vendees the superior title, unless the proof shows that he had actual notice of the existence of the title of defendants in error. This title of defendants in error was brought from Mexico in June or July of the year 1873 (see Record, p. 80; evidence of E. W. Mexia), made the thirty-seven years after the declaration of Texas independance, and nearly thirty-seven years

after the date of the above quoted Act of the Congress of Texas of 20th December, 1836, which required such titles to be recorded, or in default of such record, postponed them to a junior title acquired without notice of them. And there is no pretence there was any constructive notice which could have put Hotchkiss an enquirry as to that title in 1840. And if Hotchkiss took a good title as against the Aguilera grant, at that time, then the plaintiff in error has a good title now as against that grant. This would seem to settle the question as to which of the parties to this suit has the better title to the land in controversy covered by the Harris grant.

Further on, this question will be considered as it relates to the R. S. Patton title.

The witness Pressler (Record, p. 84), speaks of a "Land Office book of sketches," and states "that these sketches were bound up in 1847 or 1848, on one of which sketches of the Jose Ygnacio Aguilera seven league grant is shown, a copy of which sketch, certified by the Land Office, is here shown." (This sketch is shown in the Record.) He does not know how long it had been in the Land Office. This sketch is not an archive of the Land Office—is not made one by law. It is not a title to land or a muniment of title. It was not on any map of the General Land Office which was made under or by authority of the law requiring maps to be made and kept there. It is not shown to have been deposited in the Land Office under the authority of the XIV Article of the Plan and Powers of the Provisional Government.

The 40th Section of the Act of the Texas Congress of December 14th, 1837, "to reduce into one and amend the several Acts relating to the establishment of a General Land Office," is as follows:

"Each county in the Republic shall be considered and constitute a section, and that each county surveyor

be required, as soon as practicable, to make out or procure a map of each county, on which plats of all the deeded lands in said county shall be made, so as to make a fair showing of the same." Pasch. Digest, Art. 4267.

The First section of the Act of Februrary 4th, 1840, "to compell the surveyors of the several counties in this Republic to make out and return maps of their several counties," is as follows:

"Each and every county surveyor who shall not, within nine months from the passage of this Act, make out and transmit by mail, or otherwise, to the Commissioner of the General Land Office, a map of the county of which he may be surveyor, in conformity with the provisions of the Land Law, passed December 14th, 1837, shall be dismissed from office—if he shall have been in office nine months—and shall be liable to be sued on his office bond for any damage sustained by any person in consequence of such failure." Pasch. Digest, Art. 4268.

In the case of *Smith* vs. *Power*, 2 Texas, 72, it is held that, "by these various provisions, all "deeded lands," and all surveys returned to the General Land Office, and made before the closing of the Land Office in 1835, are required to be delineated on the maps of the counties; and on the return of the map of the county in which the land is claimed to be situated, the commissioner is required to patent the same."

And the following are the first, second and third sections of the Act of February 5th, 1840, to enable the surveyors of the several counties to make out and return correct maps of the same," to wit:

Sec. 1. "The Commissioner of the General Land Office be, and he is hereby required to make out and forward immediately to the surveyors of the several counties in said Republic, a full and complete copy of all the field notes of all the surveys which have been returned

to said office, of each and every survey made within any such county, previous to closing the Land Offices in 1835."

SEC. 2. "Hereafter, when any change shall take place in the boundaries of any county, it shall be the duty of any surveyor of any county, from which territory may be so taken, to furnish the surveyor of the county including such territory, with a full and complete copy of all the field notes of surveys made in the same."

SEC. 3. "It shall be the duty of each county surveyor in this Republic to make out and keep in his office, free for the inspection of all persons, a map on which all the surveys made in his county shall be laid down and properly "connected," which map shall be corrected at the end of each month."

Now, an inspection of these several provisions of law shows that the "sketch" about which Mr. Pressler testifies, was not made in accordance with, or under the provisions of either of, them. That it is not an archive. That it is not a map. No one knows who made it, or for what purpose, or when it was made; nor does any one know who put it in the General Land Office, or when it was put there, or for what purpose. There was no title of the land represented on this map in the General Land Office until July 14th, 1873. It was not on the maps of either of the counties where it is said the land lies. There is no proof that the existence of this Aguilera grant was known in either of the counties where it is claimed to be until very recently. There is no proof of the existence of any land marks showing that it had ever been surveyed, except what is said by witness Mexia (see Record, p. 85), where he says "he had seen land marks on the south boundary of the Aguilera survey, on the west bank of the Trinity river, and within Freestone county, but had never seen any other

land marks of the survey besides those above named." But on cross-examination he admitted that "said two land marks seen by him were on the north boundary line of the first league of the Semon Sanches eleven league grant." The land marks are not described as corresponding with the calls of the grant, and may be, and probably were, the land marks of the Sanches grant.

The witness Pressler, testifies (Record, p. 84), that "said Aguilera grant was not placed or delineated on any official or recognized map in the said General Land Office, until the year 1855, when the plat of said grant taken from the above-mentioned sketch, was traced upon the official and recognized maps of said Land Office, *but was traced in lines of a different color from the lines of the maped surveys recognized as titled lands*, and was thus traced and colored because there was no title or other evidence in said Land Office that it was granted lands; and that this was not done until the year 1855, at which time the location of the Riondo Palacios and Acosta grants (lying on the Trinity river) was made." And he goes on (Record, pp. 84 and 85) to state "that subsequent as well as prior to said year 1855, and down to the 14th day of July, 1873, when the Aguilera title was first deposited in the General Land Office, the General Land Office regarded and treated the lands which now appear to be covered by the Aguilera grant as vacant land, and continued to approve surveys thereon and to issue patents on the same." And in his testimony (Record, p. 85), he specifies by name a great many surveys on this grant, some made under the Mexican Government, but most of them under the Republic and State of Texas, which had been patented on the land which it is now claimed is within the Aguilera grant; and he shows that all, or about all of, had been so surveyed and titled Thus it will be seen that from 1836 to 1873, the land which it is now claimed to be covered by this grant was regarded

and treated as vacant land by the General Land Office of Texas, and surveys approved and patents issued on it. It is shown, also, by this testimony that it was even before 1836, regarded and treated as vacant by the Mexican authorities who made surveys and perfected grants to others on it. So, as this testimony shows it was treated and regarded as vacant by the people generally, who located their certificates on it, obtained patents for their lands on it, settled on it and made large farms, and cultivated and improved and sold and conveyed them during all this long period; while the defendants in error, if there really be such persons, and if they ever had any right to this land, continued to sleep on their rights; neglected to deposit their titles in the General Land Office, or to record them in the counties where the land lay; and so waited, in a foreign country, and from 1836 until 1848, a hostile enemies country in flagrant war with Texas, until the independence of the country had been established, by her heroic defenders, and until it had been settled up, and until this land had been granted to others who had cultivated it and improved it, and given it great value; and now they come forward and assert title to it, in defiance of the provisions of registration laws above quoted, and as expounded by our Supreme Court in the cases mentioned above, and in defiance of the principle that an alien heir cannot take by inheritance from an alien ancestor.

The modifications of the rules of the common law of England by the adoption of statutes of registration in the States of the American Union, like those above quoted, under which the older title to land may be postponed in favor of a junior title on account of the fault and neglect of the owner of the older title in not having it recorded, and of the wrong and injury to the owner of the junior title in allowing him to suppose his own title to be good because he could find no evidence on the

records, where the law requires it to be, of the existence of an older title, and in thus being induced to pay money for land which he would not have bought if the owner of the older title had done his duty; and the passage of statutes of limitation in all or nearly all the States of the Union, under which the rights of the holder of the older title may be postponed and set aside in favor of a younger title, accompanied by peacable, uninterrupted, adverse possession, held in good faith; and statutes under which settlers in good faith are allowed pay for lasting and valuable improvements, where the owner of the older title has neglected to give actual or constructive notice of the existence of his title; all rest on the same general principle that the interests of society make it necessary for the citizen to use his own property so as not to injure his neighbor, and that a failure to comply with the express or implied commands of the law by giving either actual or constructive notice of his grant, shall not injure one acting in good faith and without fault in the absence of such notice.

Mr. Chancellor Kent, in his Commentaries, vol. 2, p. 337, gives some of the reasons for such laws, in discussing the statutes allowing pay for improvements, as follows:

"They require the value of improvements to be assessed, and, at all events, to be paid, and they are strictly encroachments upon the rights of property, as known and recognized by the common law of the land. There were, however, peculiar and pressing circumstances which were addressed to the equity of the law giver, and led to the passage of those statutes in reference to waste and uncultivated lands in a new country, and where the occupant was not liable to any imputation of negligence or dishonesty. The titles to such lands had, in many cases, become exceedingly obscure and difficult to be ascer-

tained by reason of conflicting locations, and a course of fraudulent and desperate speculation; and it is impossible not to perceive and feel the strong equity of those provisions."

And others of the reasons for this kind of legislation are stated by the Supreme Court of Texas, by Chief Justice HEMPHILL, with the sanction of his able associates, in discussing our laws of limitation, as follows:

"Nor can the section relative to the right of entry be construed to have any effect on the right of possessors as guaranteed by the 15th, 16th, and 17th sections of the statute." (See Pasch. Dig., articles 4622, 4623, and 4624, pp. 766 to 768, for the sections referred to.) These sections, together with the 39th section of the act of 1836," (Pasch. Dig., art. 4602, p. 758,) "evince the settled policy of the Government to protect the actual possessors, through whose agency alone the soil could be cultivated, houses built, improvements made, and the wilderness reduced to civilization. It is well known that titles to immense bodies of our lands were, especially at the period of the passage of these laws, conflicting and uncertain. Superadded to these difficulties, extensive portions of our frontiers were infested by the incursions of ferocious and hostile savages. This insecurity of title prevailing so extensively, and in addition, on the frontiers, the perils to be continually encountered, pressed with the weight of an incubus on the prosperity of the country. And the settlement of the frontiers, especially, could not advance, unless there was some security that the lands conquered from the savages and beasts of prey should become the property of the actual conqueror and settler of the soil, provided, that if there was a claimant having an equitable or legal title, he should have a reasonable time to set up and establish his claim.

"The experience of this and other countries furnishes

the most abundant proof that the improvement and settlement of a country are paralyzed by the uncertainty of titles to real estate. Labour will not be exerted when its fruits are insecure, and may possibly go to the benefit of another.

"To obviate evils springing from this state of things, to give repose and security to title, to secure the advancement, settlement, and improvement of the country, the Legislature fixed certain periods beyond which the actual occupant of the soil should not be disturbed in his possession by any interfering claim whatever." (See *Horton* v. *Crawford*, 10 Texas, pp. 388 and 389.)

For these and other reasons the policy of such laws is now probably adopted by the Legislatures of every State in the Union, and enforced by their courts.

The Supreme Court of Texas, in the case of *Grumbles* v. *Sneed*, 322 Texas, pp. 575, 576, *et seq.*, in discussing the 40th section of the act of December 20th, 1836, which provides that "no deed, conveyance, lien, or other instrument of writing, shall take effect, as regards the rights of third parties, until the same shall have been duly proven and presented to the Court, as required by this act for the recording of land titles," &c., gives the reasons for such legislation, and states the principles and policy on which it rests, as follows:

"The decision in the case of *Crosby* v. *Houston* was upon the well established principle of courts of equity, that fraud shall not be permitted to prevail. It is upon this principle that courts of equity will not permit a subsequent purchaser, who has notice at the time of his purchase, of a prior unregistered conveyance, to avail himself of his title against the prior conveyance. The authorities cited by Chief Justice HEMPHILL, in the case of *Crosby* v. *Houston*," (1 Texas, 203, 238,) "are the leading cases in which this rule of the equity courts is declared.

He also cites Judge Story's Commentaries on Equity Jurisprudence, where the authorities are reviewed. And the rule is laid down in *Crosby* v. *Houston*, with its proper and well established limitation, and that is, 'that the letter of the statutes (on the subject of registry) will be departed from only where the notice (on the part of the subsequent purchaser' is so clearly proved as to make it fraudulent in him to take the conveyance in prejudice of the known title of the other party. We are accustomed to say a great deal about the policy of the registry laws. What is the policy of the registry laws? Certainly it is mainly to prevent and suppress frauds. The registry laws are but an extention of the principle of the statute of frauds, which requires contracts for the sale of land to be in writing. One statute requires the contract to be in writing; the other declares that it shall not take affect, as against the rights of third parties, unless it be also registered. The object of both laws is to prevent and suppress fraud. But statutory enactments which seek to control the actions of men can never perfectly attain their object, and frauds will be perpetrated notwithstanding the efforts of the law-makers to suppress fraud. And for this reason the courts have engrafted an exception on the statute—an exception in the very spirit of the statute itself, and having directly in view the object which the statute seeks to accomplish. The registry acts require certain instruments to be recorded. Why? To prevent frauds. But how will registration prevent frauds? By giving notice to all the world of what has been done." &c.

These last three authorities, Kent, 10 Texas, 388–9, and 22 Texas, 575, place in a very full and clear light the object and policy and justice of our registration laws.

But a foreign registry is not notice. (See 6 U. S. Cond. Rep., 356; *McClenny* v. *McClenny*, 3 Texas, 197; *Warren* v. *Dickerson*, Ib., 462.)

The attention of this court is especially invited to the whole case of *Gibbean* v. *Mays*, 10 Texas, 410, as being conclusive of this question in favor of plaintiffs in error upon the facts presented in the record. The silibus of that case give a fair statement of the principle determined, and is as follows:

"Where there is no record of a prior grant in the General Land Office nor in the county where the land is situated at the date of the subsequent location, the subsequent location will hold the land unless the locator had actual notice of the previous appropriation of the land, or the facts were such as would have put a prudent man on inquiry, under such circumstances that the inquiry would probably have resulted in the ascertainment of the truth."

It will be seen by the court (Record, p. 86) that plaintiff in error "proved by Jacob Crist, W. G. W. Gowens and W. Reader that Thomas G. Kimbrough, and one of the persons under and through whom the defendant," (plaintiff in error,) "derives his title to the 1,855 acres, part of the Edward C. Harris league, and part of the land in suit, settled upon said 1,855 acres in the fall of 1854, and opened and enclosed 250 or 300 acres that same year, and that since such settlement by said Kimbrough, in the year 1854, the said 1,855 acres have been continuously and uninterruptedly occupied and the enclosed land cultivated by said Kimbrough and those deriving their title under him, down to the present time." From this it will be seen that this settlement and improvement was made the year before the time when the witness Pressler says the lines of the Aguilera grant were traced on the map in the General Land Office in colors which differed from the color of the other lines, because there was no title in the Land Office to show that it was deeded land. This shows that the actual possession and extensive cultivation

of the Harris league, by plaintiff in error, and his vendors, went on concurrently with the several conveyances of the land, all of which conveyances were duly registered; (see Record, pp. 32 to 49) from the testimonio to Harris, which was recorded March 5, 1838, (see Record, p. 40,) down to the deed to the plaintiff in error, were all properly recorded, and notice given to the world of their claim to the land.

It is stated by the court in the 15th bill of Exceptions (see Record, lower part of p. 82) that "There is no evidence that the defendant, or any of those through whom he derives title, had any actual notice at the time they respectively acquired their titles of the existence of the said Jose Ygnacio Aguilera title under which plaintiffs derive their pretended title."

The 18th assignment of error (Record, p. 87) may be considered along with the 16th, just examined. The error in the charge of the court here complained of is, that in substance it charged the jury that both the Harris title and the Aguilera title emanated from the Mexican government, before the existence of the Republic of Texas, and that under these facts the junior title, that under which plaintiffs in error claims, had no advantage of the Aguilera title, under which defendants in error claim, by reason of the fact that the latter had not been recorded. In this charge it will be seen that among other things the court says plainly that, "In other words, the fact that the plaintiffs failed to register their title, and that defendant acquired his in good faith and without notice of plaintiffs' title, constitutes no defence to this action." This court will see, by reference to the statutory provisions above quoted, requiring the recording of all titles to make them effective against third parties, and by the decisions of the Supreme Court of Texas, above quoted, which decide that the titles issued by the former govern-

ment, that is, before the declaration of Texian independence, are within the requirements of these statutes; that this charge of the court is directly in the face of and against these statutes, and against the repeated interpretations of them by our own Supreme Court; and in the face of the fact that the interpretation of these statutes by the Supreme Court of Texas, make these decisions a part of the law, of the statutes themselves, so to speak. This charge is so manifestly erroneous, in the light of the statutes and decisions above quoted, that it is not thought necessary to discuss it further.

4. If this Court should hold that the claim of title from R. S. Patton to plaintiff in error, for the 153 acres of land, ought not to have been excluded from the jury, on account of the neglect to cancel the revenue stamps which were on the deed from E. M. Dunn and his wife, Ann, to plaintiff in error (see Record, p. 78), and which was executed February 1st, 1869, then upon the question of the right of plaintiff in error to a judgment for that part of the land in dispute also, the following is submitted:

The patent from the State of Texas to R. S. Patton, for two-thirds of a league and one labor of land (Record, p. 79), dated November 25th, 1854, embracing the 153 acres of land in controversy, was offered in evidence by plaintiff in error.

Next he offered in evidence (Record, p. 79) a deed from R. S. Patton to Thomas G. Kimbrough, dated December 30th, 1854, purporting to convey all the land described in said patent.

Next he offered a certified copy of a patent to said R. S. Patton (Record, p. 79) for 10 and a fraction labors of land comprising said 153 acres, and such other parts of said two-thirds of a league, &c., labor, as was not in conflict with the E. C. Harris league.

He then offered in evidence the deed from T. G. Kimbrough to E. M. Dunn and this plaintiff in error (Record, p. 79), when the defendants in error objected to its admissibility because the revenue stamps on it had not been cancelled, and this objection was sustained, and it and the other deed and patents were also excluded by the Court. (See Record, p. 79.)

The precise date of the inception of the title to the Patton survey is not shown by the Record, but the first patent to it, which, as the Record shows, embraced the 153 acres in controversy, was issued on the 25th day of November, 1854, a year before the lines of the Aguilera survey were traced in unusual colors on the map, as heretofore explained. Then the deed from Patton to Kimbrough is dated Nov. 30th, 1854. This, too, antedates these lines of the Aguilera survey, which had been improperly traced on the maps of the Land Office.

The next deed brings the title to Dunn and Airhart, the plaintiff in error, and all regular, except as to the want of the cancellation of the revenue stamps on the latter deed. Under the facts and authorities hereinbefore presented, and which it is not necessary to repeat, the title of plaintiff in error to this 153 acres of land is unquestionable, as the proof shows conclusively that when the patents issued for it and when the deeds were made, the parties to them had neither actual nor constructive notice of the existence of the title of defendants in error; and if it be insisted that some sort of lines were traced on the maps of the General Land Office in 1855, this, it will be remembered, is the year after the date of the grant to Patton and sold by him to Kimbrough. But the tracing of those lines on the maps was not notice, for the reason stated by witness, Pressler—that after being aroused to enquiry by them, an examination could only disclose the fact that there was no such title

in the Land Office, and no record of any such survey or title in the counties where the land purported to lie until 1873.

The issuance of two patents for this land is explained, but obscurely, in the Record, p. 79, to have been caused by the fact that the first conflicted with the Harris league. This was done under the authority of articles 4,301 and 4,302 of Pasch. Dig., p. 716, intended to enable parties to correct their surveys and patents where they are found to be in conflict with older surveys and patents.

5. In this connection it will also be convenient and proper to consider the 20th bill of exceptions.

The Circuit Court charged the jury, (Record, p. 88,) in substance, that the defense set up by plaintiff in error, (Record, pp. 9 and 14,) that he is an innocent purchaser, without notice, is not available to him under the decisions and laws of Texas, and can only avail a defendant who holds by a patent from the Republic or State of Texas, based upon a valid land warrant and survey, and does not embrace the character of title exhibited by the defendant.

This charge of the Court, it will be seen, is general, and if allowed to stand as the law, would set aside the registration laws and the decisions of the Supreme Court hereinbefore quoted; and these show conclusively that they have reference to and embrace as fully conveyances which were made under the former Mexican Government as those made under the Republic or State of Texas. It is not necessary to repeat the authorities. In this sense, the charge is certainly incorrect.

But it is just to say that it was not probably the intention of the Circuit Court, that the charge should embrace this scope, though such, it is submitted, is its effect.

The plaintiff in error, in addition to the registration laws, relied on the 2d section of the act of October 20th, 1866, "supplemental to and amendatory of an act entitled 'An act to regulate proceedings in the district courts,'" approved May 13th, 1846, (Pasch. Dig., art. 5825, vol. 2, pp. 1194 and 1195, hereinbefore quoted.) It may be best to quote it again here. It is as follows:

"Titles to land which may have been deposited in the General Land Office subsequently to the time when the land embraced in such titles had been located or surveyed by virtue of valid land warrants or certificates, shall not be received as evidence of superior title to the land against any such location or survey, unless such elder title had been duly recorded in the office of the County Clerk of the county where the land may have been situated, prior to the location and survey, or the party having such location or survey made had actual notice of the existence of such elder title before he made such location or survey."

This act was passed for the purpose, thirty years after the revolution which separated Texas from Mexico, of establishing a rule of evidence for the protection of the people of Texas against what was supposed to be stupendous frauds in the recent manufacture of pretended titles to large tracts of country, by which thousands of the families of Texas were likely to be deprived of their homes acquired under the law and in good faith, against the heartless rapacity and corruption of greedy and unprincipled speculators in this class of pretended titles. While it is not in the record of this case, it ought to be said, as a part of the history of the country, that very many such grants, never heard of before, for immense tracts of country, now and long since well settled up and improved and cultivated by an industrious population, and in the very heart of the State, have been, within the

last five years, brought into Texas from Mexico, and deposited in the General Land Office, and that the claimants under them, almost or quite universally, sue the settlers on where they are claimed to be located, in the Federal Courts, and in many, if not most cases, force iniquitous compromises, or obtain judgment and possession, because the settlers are unable to meet the expenses of litigation in those courts, often at a great distance from their homes. And as a part of the history of the country, the attention of this court is respectfully called to Article XIII, pp. 58, 59, and 60 of the new Constitution of the State of Texas, adopted in the year 1876, which was intended to guard against and to remedy the same monstrous evils, as well as in part to maintain and declare the proper construction of former provisions of the Constitutions and laws of Texas on this subject. This article of the Constitution is too long for convenient insertion in this brief, but the attention of this Court is specially invited to it. But a part of the 2d section of that article, p. 58, is here quoted, as follows:

"Any claim of title or right to land in Texas, issued prior to the 13th day of November, 1835, not duly recorded in the county where the land was situated, at the time of such record, or not duly archived in the General Land Office, or not in the actual possession of the grantee thereof, or some one claiming under him, prior to the accruing of the junior title thereto from the sovereignty of the soil, under circumstances reasonably calculated to give notice to such junior grantee, has never had, and shall not have, standing or effect against such junior title or color of title, acquired without such or actual notice of such prior claim of title or right."

This, it will be seen, asserts the rule, and declares what the rule in Texas has been on this subject, and is in full harmony with the previous constitutional provisions and

statutes of the Republic and State of Texas, and with the decisions of the Supreme Court of Texas, several of which are hereinbefore quoted.

It was contended, by the counsel for the defendants in error, on the trial in the Circuit Court, that the statute above quoted had no reference to grants from the Mexican government, and that none could avail themselves of its provisions but those who claimed under "valid land warrants or certificates;" and that "land warrants and certificates" were not known in the Mexican system of granting lands. And it is presumed that, in the charge under consideration, the court meant only to concur with these views of counsel on that point.

Whatever may be held to be the proper interpretation of the language of this statute, there is no doubt that it was the intention of the Legislature that it should apply to all junior titles, known to our land system, whether they emanated from the authorities of Mexico or of Texas; and that it was, in fact, intended for a general rule, without exception, for the benefit of all claimants under junior titles; and that there was no other design in the use of the words "valid land warrants or certificates" than to indicate, in a general way, claimants under junior titles. The whole history of our legislation and judicial decisions on this subject shows that this statute cannot be construed to have the limited meaning contended for by counsel and given to it in this charge. If it is held to have the broader meaning here contended for, of being available to all claimants under junior titles, then it is conclusive of this case in favor of the plaintiff in error. But he is not dependent on this construction for his security, as his rights are thought to be fully secure under the received construction of the registration laws herein discussed, under the facts of this case, and as an innocent purchaser in good faith.

The section of the statute now being considered does not seem to have come under review by the Supreme Court of Texas; and, possibly, for the reason that no one has heretofore thought of assuming that its benefits were limited to those only who claimed under a land warrant or certificate.

XI. In support of the 17th assignment of error the following is submitted:

This is a joint action at law. The plaintiffs in the court below claim that they are the owners of the land sued for. They ask for a joint judgment for all of them, and for a writ of possession for the whole of the land in the event that they obtain that judgment; their prayer is for a judgment for the whole grant, and for a writ of possession for all the land sued for. The judgment must have followed the prayer of the petition, and the writ of possession must have followed the judgment in a case at law in the United States courts where the distinction between proceedings at law and in equity is preserved. There was not, and could not in this suit be, a prayer and judgment for partition, and a proceeding by which the rights of some of the defendants in error should be adjudged to them, and of others of them adjudged against them, or a part of the land decreed to plaintiffs and a part of it to the defendant. This could only be done, if at all, by a court of equity upon proper proceedings. In a court of law the plaintiffs must prove their case as alleged in order to be entitled to a judgment. They could not be allowed, as they were in the Circuit Court, a judgment for all the land sued for upon proof which showed that the right to five-eighths of this land was barred, under our three years statute of limitations.

The right of Anna Redding Messieu, the mother of the intestate, one of the plaintiffs below, if she had any,

was to one-half the estate of her deceased daughter, (Pasch. Dig., art. 4319), Anna Matilde Messieu, who died in August, 1851. (See the testimony of witnesses Mexia and Hemiken, Record, p. 86.) Her right, if any she had, accrued at that time. The defendant's vendor went into possession of the 1,855 acres of land on the Harris grant in 1854. (See testimony of Crist, Garven, and Reader, Record, p. 88.) The statute then began to run against her. She was then a *feme sole*. Her husband died in 1849 or 1850. (See testimony of Mexta and Hemiken, Record, p. 86.) I need not introduce authorities to show that when the statute begins to run it is not stopped by a change of the status of the party against whom it is running, nor to show that one disability cannot be tacked to another.

There was no interruption of the running of the statute in this case from 1854 to January, 1861, about seven years. The statute was then suspended until the 30th of March, 1870. (See State Constitution 1870, art. 12, sec. 43; Pasch. Dig., vol. 2, p. 1132.) The suit was commenced on the 13th day of June, 1872, so the statutes of limitation again ran against her from the 30th of March, 1870, until the 13th of June, 1872, two years, two months, and thirteen days. These two periods added together shows that the statutes of limitations ran against her (the owner of one-half the land sued for) more than nine years and seven months, so that her rights were barred under the three years statutes. (See Pasch. Dig., art. 4623.)

Then, again, if the one of these sisters of Anna Matilda Messieu, deceased, was three years younger than her, she would have been thirteen years old in August, 1851. Eight years after, in August, 1859, she was twenty-one years of age. The statute would have run against her one year and four months on the 28th of

January, 1861, when its running was suspended. Add to this two years two months and thirteen days from the time it commenced to run again, on the 30th of March, 1870, to the time of the commencement of this suit, and it will be seen that her rights were barred, under the three years statute, by more than seven months—the statute having certainly run against her more than three years and seven months before this suit was brought.

Thus we find that the right to one-half of the land sued for, and to one-fourth of the remaining half, was certainly barred under the statute of limitations of three years. As to that portion of the land, under the laws of Texas they could not recover against Airhart. Under the section of the law of limitations quoted they had no right of action after the expiration of three years. They were not entitled to a judgment for this part of the land, or to a writ of possession for it; and the neglect of the Messieus to partition the land between themselves, and cause the rights of those who could sue to be set apart to them, cannot be visited on Airhart, who was in no fault, and had neglected no duty in this respect.

If a part of the plaintiffs, in the Court below, are barred of their right to recover, it is submitted that none of them can recover in this suit.

"If an estate descends to purchasers" (and the Messieus would be coparceners at common law), "one of whom is under a disability which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the others after twenty years have elapsed." (Adams on Ejectments, *vide* p. 56.)

To avoid the possibility of a technical question being raised on the authorities hereafter to be presented on this question, the following is quoted:

"The general doctrine, therefore, in respect to adverse

possession, as between coparceners, applies that applies as between tenants in common and as between joint tenants." (Angell on Limitations, 6th edition, p. 439.)

This Court is referred to the case of *Marsteller* v. *McClean*, 7 Cranch, 156, as decisive of the question raised under this assignment. On p. 159 of this case will be found the following:

"It seems to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported; and the case of *Perry* v. *Jackson*, cited from 4 Term Reports, 516, decides that a plea of the statute of limitations, which is good as to one partner, bars them all in a joint action. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action."

Reference is also made to following authorities, as to the effect of the law of limitations on a joint action by several heirs where some have disabilities and others are of age and barred. (*Dukey* v. *Armstrong*, 1 March., Ky., p. 39; *Simpson* v. *Shannon*, 3 *Ib.*, 362; *Turner* v. *Debell*, 2 March., Ky., 384; *Johnson* v. *Harris*, 3 Haywood, 113; *Thomas* v. *Munolier*, 4 Bibb, 412; *Riden* v. *Fren*, 2 Murphy, N. C., 577.)

In Connecticut, Tennessee, and Kentucky it has been held that an adverse possession against two tenants in common, one of whom is within the savings of the statute, operates against the other, and so with coparceners. *Doolitle* v. *Blakely*, 4 Day, Com. Rep., 265; *Sanford* v. *Button*, *Ib.*, 210; *Wells* v. *Rayland*, 1 Swan, Tenn. Rep., 501; and *Baker* v. *Grundy*, 1 Duval, Ky., 281.

21st Assignment of Error.

XII. It is submitted that the 21st assignment of error is well taken, viz:

That the court erred in overruling appellant's motion for a new trial. See motion on page 30th of the printed record. See, on page 31st, order of the court overruling the said motion. It is insisted that the verdict of the jury was contrary to the evidence and to the law as charged by the court. See charge of the court on statute of limitations of three years, page 25 of the printed record. See 9th bill of exceptions, page 78th of the printed record, showing that appellant proved a regular chain of title from and under the sovereignty of the soil to himself to the 1,855 acres of land of the Edward C. Harris grant described in his answer. See 16th bill of exceptions, page 86th of the printed record, which show that Anna Matilda Messieu, under whom appellees claim, died in August, 1851. That her father, Victor Messieu, died in the year 1849 or 1850. That his widow, Anna Redding de Messieu, was 16 years of age in 1834, and remained a widow after her husband's death. That all of said plaintiffs were born prior to the death of their father, and that there was an interval of two or three years between the birth of the children of said Victor Messieu and Anna Redding de Messieu. That Anna Matilde Messieu was the eldest, and she was about fifteen months old on the 10th of March, 1836. Witnesses for appellant Crist, Jawers, and Reader all testify that Thomas G. Kimbrough, one of the persons under and through whom appellant derived his title to the 1,855 acres of land, part of the Edward A. Harris grant, and a part of the land in suit, settled upon said 1,855 acres of land in the fall of the year 1854, and opened and inclosed between 250 and 300 acres that same year, and that since said settlement by said Kimbrough in the year 1854, the said 1,855 acres have been continuously and uninterruptedly occupied and the inclosed land cultivated by said Kimbrough and those deriving title under him down to the present time. That plaintiff's petition in this case

was filed on the 3d day of June, 1872. Now, your honors, it is earnestly contended that the appellant proved a regular chain of title, and three years adverse possession as against Anna Redding de Messieu and at least one of her children. Our statute of limitations, 15th section, 1 vol., Paschal's Digest, art. 4622, reads: "Every suit to "be instituted to recover real estate as against him, her, "or them in possession under title or color of title shall "be instituted within three years next after the cause of "action shall have accrued and not afterwards; but in "this limitation is not to be computed the duration of "disability to sue from the minority, coverture, or insan-"ity of him, her, or them having cause of action. By the "term title, as used in this section, is meant a regular "chain of transfer from or under the sovereignty of the "soil, and color of title is constituted by a consecutive "chain of such transfer down to him, her, or them in "possession without being regular; as one or more of "the memorials or muniments be not registered or not "duly registered, or be only in writing, or such like de-"fect as may not extend to or include the want of intrin-"sic fairness and honesty, or when the party in possession "shall hold the same by a certificate of head-right land "warrants or land scrip with a chain of transfer down to "him, her, or them in possession; and provided, that "this section shall not bar the Government." (See Pas-"chal's Digest, 1st vol., art. 4607, which reads: "In case "of the death of any person in whose favor there may be "cause of action the statute of limitation shall cease to "run against such cause of action until twelve months "after such death, unless an administrator or executor "shall have sooner qualified according to law upon such "deceased person's estate, then, and in that case, the said "statute of limitations shall only cease to run until such "qualification." (See Law of Descent and Distribution in Texas, article 3419, 1 vol., Paschal's Digest which

"reads: "When any person having title to any estate
"of inheritance, real, personal, or mixed, shall die intes-
"tate as to such estate and shall leave no surviving hus-
"band or wife it shall descend and pass in parcenary to
"his or her kindred, male or female, in the following
"course, that is to say: 1st, To his or her children and
"other descendants, if any there be; 2dly, If there be no
"children nor other descendants, then to his or her father
"and mother in equal portions." * * *

"But if only the father or mother survive the intes-
"tate, then his or her estate shall be divided into two
"equal portions, one of which shall pass to the survivor
"and the other half shall pass to the brothers and sis-
"ters of the deceased and to their descendants, or to
"such of them as there may be." * * * *

Your honors will see from the above statute that the estate of Anna Matilda Messieu, (if it was an estate of inheritance,) at the date of her death in August, 1851, passed as follows: One-half to her mother, the appellee, Mrs. Anna Redding de Messieu, and the other half to her brothers and sisters, she having died without children and never having been married, and her father, Victor Messieu, having died in 1848 or 1849. Mrs. Anna Redding de Messieu has never been married since her husband's death in 1848 or 1849. The adverse possession of plaintiff in error, as to her, commenced with the settlement of Thomas G. Kimbrough in the fall of the year 1854, which possession continued without interruption till the commencement of this suit in July, 1872. The statute of limitations began to run against her in the year 1854, and had run against her in favor of appellant's title and possession for at least seven years. It is submitted that there can be no question under the law and evidence in this cause that Anna Redding de Messieu who inherited one-half of the land sued for (if she could inherit at all)

was barred and prescribed by the three years law of limitations at date of bringing this suit, and that the Circuit Court erred in overrulling appellant's motion for a new trial; and that for the reason that said Anna Redding de Messieu was barred and had no right to recover in this action, that the judgment of the court below should be reversed and this cause remanded.

JOHN H. REAGAN,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

AIRHART, *Plaintiff in Error*, *vs.* MASSIEU ET AL.	October Term, 1878. No. 61.

BRIEF FOR DEFENDANT IN ERROR.

This was an action of ejectment to recover some 2,008 acres of land. The plaintiff's title was derived from the Mexican State of Coahuila and Texas, by a grant to one Aguilera, in 1833, who, March 10, 1836, conveyed it to Anna Matilda Massieu, an infant, a few months old, who died in 1851, intestate, leaving the plaintiffs, her mother and younger brothers and sisters, her heirs at law.

In the course of the trial there were offered in evidence a Land Office copy of the original grant or protocol, which was obtained from the Governor of Coahuila, and deposited in the Land Office in 1873; also, the original testimonio which had been recorded in the counties where the land lies, in 1870; also a sketch or map of the land granted, which was on file in the Land Office as early as 1848, and had been transferred to and plotted upon the official Land Office maps in 1855; also a translation from the Land Office of an abstract on file there of grants made prior to June 11th, 1830, which was the date of the abstract, and on which the grant to Aguilera was noted.

The defendant, besides objecting to the proof of plain-

tiff's title, set up a title in himself, first to 1855 acres under a Mexican grant from the same State, made in June, 1835, and a title for 153 acres under a grant from Texas in 1854. The questions affecting the plaintiff's title, relate to the proof thereof, and to the capacity of aliens to take and transmit title to lands in Texas.

The questions affecting the defendant's title, relate to the effect of the registry acts, and acts of limitation of Texas. All these questions are brought upon the record by bills of exceptions, although some of them were raised by the pleadings.

First Exception.

(Rec., pp. 54–8.)

The defendant demurred generally, January 10, 1873. (Rec., p. 5.) The demurrer was not ruled on until the trial, February 8, 1875. Meantime the plaintiff amended four times, and the defendant six times. Then defendant called up his demurrer, and it was overruled, and the ruling made to appear by bill of exceptions.

The demurrer was clearly waived by the amendments, and by going to trial on the merits.

Second and Thirteenth Exceptions.

(Rec., pp. 58–9.)

Plaintiffs having amended their petition by averring their right to sue under the constitutions and laws of the United States and of Texas, defendants excepted (Rec., p. 16,) because the amendment did not state the facts on which they relied for their right to sue. This is in effect a demurrer, and was waived by going to trial, or cured by verdict, but it may be said here that the question it sought to raise, was whether an alien could maintain an action to recover land in Texas.

The averments of the petition gave jurisdiction to a United States court, it being stated that the plaintiffs

were citizens of Mexico, that is, a foreign State, (Rec., pp. 3–13) and the defendant, a citizen of Texas. (Rec., pp. 12–13.)

That aliens cannot sue in the courts of Texas, except under special circumstances, (Brief, P. E., p. 21,) is nothing to the purpose, because the jurisdiction of the United States is not limited to cases within the jurisdiction of the State courts. The constitutional provision extending the jurisdiction of the Federal courts to suits of aliens was in anticipation, among other things, of just this case: that the States might refuse to give these courts jurisdiction.

The right of a Mexican citizen to maintain an action for lands in Texas, was expressly ruled by this court in the case of Jones *vs.* McMasters, 20 Howard, 8, a case from the United States District Court of Texas. The court said, "Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is whether or not she is under any disability that would prevent from the assertion of her title to the premises in question," and concluded, "the defence of a lineage therefore was properly overruled by the court below."

The question whether an alien could recover land is again raised in the thirteenth exception.

THIRTEENTH EXCEPTION.

(REC., p. 80.)

The defendant asks the court to instruct the jury that if Anna M. Massieu was an alien, and if the plaintiffs who claimed under her were aliens, then the plaintiffs could not recover. The ground taken by the defendant was that an alien could not inherit from an alien. The court refused the instruction.

The law upon this subject was for a long time unsettled, Holliman *vs.* Peebles, 1st Texas, 673, an action brought in 1840, and decided in 1846, is considered as the leading case, but improperly. The precise question there was,

"whether the alienage of the plaintiffs disabled them from maintaining the action." The same question has been noticed under the second exception. The reasoning of the court, however, went to the question whether an alien could inherit land from an alien. The Chief Justice, in delivering the opinion, came to a conclusion adverse to the right with great hesitation, and said that from want of authorities, and opportunity for investigation, he had not attained a satisfactory and positive conclusion on the subject.

In Yates *vs.* Ijams, 10 Texas, 168, the same judge reiterated his doubts and difficulties, and decided the case upon the principles pervading the colonization law of 1823. These, it will be observed, were cases where foreigners had come into Texas to obtain colonization grants.

The Act of Jan. 28, 1840, re-enacted March 13, 1848, provides:

"When *any person* having *title* to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave no surviving husband or wife, it shall descend and pass in parcenary to his or her *kindred*, male or female, in the following course, that is to say," &c. Oldham & White's Dig., p. 99, Art. 345.

When this law was passed in 1840, the common law had not been adopted in Texas, and consequently the common law doctrine as to want of heritable blood, did not enter into the act as an element of construction.

In 1855 this court decided, in the case of McKinney *vs.* Saviege, 18 Howard, 235, that, under the laws of Texas, an alien could not inherit from an alien. Mr. Justice Campbell, who delivered the opinion of the court, said the question had not arisen in the courts of Texas, but founded his opinion upon the principles of the cases last above cited. This case of McKinney *vs.* Saviego came up from

the United States District Court of Texas, which had decided that an alien could inherit from an alien.

In Jones *vs.* McMasters, 20 How., 8; in Osterman *vs.* Baldwin, 6 Wall., 116; in Barclay *vs.* Cameron, 25 Texas, and in Barrett *vs.* Kelly, 31 Texas, 476, the doctrine was established that an alien could take title to lands in Texas, and could hold it, until, by proper proceedings at the instance of the State, the lands should be declared to have escheated or forfeited.

Jones *vs.* McMasters was decided in this court A. D. 1857. The case came up from the United States District Court of Texas. It was an action of ejectment, brought by a Mexican citizen upon a Mexican grant made to her grandmother, a Mexican citizen, in 1833, at Oaxaca, which descended to the plaintiff. Having proved her title, the defendants proved the grant from the State of Texas in 1849, and prayed the court to instruct the jury that if the plaintiff, as a Mexican citizen, had continued to reside out of Texas from a period before the Declaration of Independence, the action could not be sustained. The court refused the prayer, and judgment was for plaintiff.

Mr. Justice Nelson delivered the unanimous opinion of the court, and on this point said;

"Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is, *whether or not she is under any disability that would prevent her from the assertion of her title to the premises in question?* In other words, whether her absence or alienage worked a forfeiture of the estate? The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired [authorities], and consequently the plaintiff's right still exists in full effect, unless the new sovereignty created within which the lands are situated, have taken some steps to abrogate it." He then cites the constitutional provision of 1836, declaring that aliens shall

This mode of anticipating the evidence, was wholly irregular; the plaintiff demurred, and the demurrer was sustained. Precisely the same question was made when the evidence was put in, and has been discussed under exception thirteen.

FOURTH EXCEPTION.

(Rec., pp. 60–71.)

The plaintiffs offered in evidence a Land Office copy of the protocol or original grant, (Rec., pp. 60–64,) also the original testimonio; also a translation of the testimonio. The insertion of the Spanish testimonio was waived, but to the introduction of it, and its appended affidavits and certificates, the defendant objected, because it was not authenticated for record according to law.

No objection appears to have been made to the Land Office copy of the protocol. The objections apply only to the testimonio, and are confined to the registry thereof. By statute, in Texas, Paschal's Dig., Art. 3715, Land Office copies of archives, or records there, are made evidence, and the certification of this copy of the protocol was in exact accordance with the form sanctioned by the Supreme Court of Texas, in Herbert *vs.* Bartlett, 9th Texas, 97–99–102. Whether this was an archive, and capable of being certified in evidence, was subsequently made a question in exception No. 11.

Now, as to the admissibility of the testimonio in evidence. The only objection made is that it had not been properly authenticated for record. It was authenticated for record by the affidavit of one witness, who testified to the handwriting of Alderete, who signed the grant and also signed and issued the testimonio. In Paschal *vs.* Perry, 7 Tex., 358, the court said, "If the instrument be legal and authoritative without subscribing witnesses, it would require language too plain to be mistaken to exclude it from record for want of proof by such witnesses, the sig-

not hold land in Texas, and the two provisions in the then constitution, which maintained all existing rights, and provided for legislation to determine what lands had escheated or been forfeited, and determines that, until such legislation, no effect can be given to the plea of alienage. *The defence of alienage, therefore,* [he concludes] *was properly overruled by the court below*" Pp. 20, 21.

Finally, in Sabriego *vs.* White, 30 Texas, 576, the Supreme Court of that State declared that, under the laws of Texas, and especially the act of descents, if any person having title to land in Texas died, it should descend to his children (or kindred), whether aliens or not, and that the decision of the Supreme Court of the United States in 18 Howard, 235, has been pronounced under a misconception of the law in Texas.

This decision was followed in Settegast *vs.* Schrimpf, 35 Texas, 323, in which the court said that the common law rule that an alien could not cast descent upon an alien, was totally inapplicable to the State of Texas, and in Hammekin *vs.* Clayton, 2 Woods, 336. Finally, in the case of Andrews *vs.* Spear, in the Supreme Court of Texas, in January last, Texas Law Journal, 206, the court said that the case of Settegast *vs.* Schrimpf settled the law of Texas in regard to the operation of the statutes of descent in the case of aliens, and the question would not be re-opened. Such being the settled construction of the statutes of descents in Texas, in the highest court of the State, persisted in now for ten years, this court will adopt and follow it. Hall *vs.* DeCuir, 95 U. S., 485–7; Christy *vs.* Pridgeon, 4 Wall., 196–7.

THIRD EXCEPTION.

(Rec., pp. 59–60.

The defendant, by "plea in bar," (Rec., p. 11,) set forth the plaintiff's title, and pleaded that they could not maintain an action upon such title.

nature of the signer being substantiated by satisfactory proof." See 18 Texas, 148–151. In McPhaul *vs.* Lapsley, 20 Wall., 264, a similar question arose. The Court in deciding that the testimonio was properly recorded, referred to the argument of counsel, which maintained the record on two grounds, one of which was, that by the recording act of Texas, therein set forth, a copy of any act in the public archives, certified by the proper officer, in conformity to the laws then in force, could be recorded. This is precisely such a case, the grant being an archive in Mexico, certified by the custodian thereof, before the separation of Texas.

But this Court also said in that case that whether recorded, or not, it was admissible in evidence. That it is so without other proof of its execution, except merely corroborated circumstances, see Smith *vs.* Townsend, Dallam, 569; Herndon *vs.* Casiano, 7 Texas, 331; Titus *vs.* Kimbro, 8 Texas, 213; Watrous *vs.* McGrew, 16 Texas, 508; McKissack *vs.* Colquhoun, 18 Texas, 148; see also 6 Wallace, 773, and 20 Howard, 250.

In this case the protocol had been proved. As regards the attesting witnesses to the grant, their signatures were not on the testimonio, but only copies thereof; the deed was 37 years old, and they are conclusively presumed to be dead.

Moreover as an ancient deed, aided by the corroborating circumstances, the testimonio, which is an original (Dallam) proved itself, (1 Greenl. Ev., sec. 21, 570.) The deed comes from the proper custody, is free from just grounds (or any grounds) of suspicion, is corroborated by the original protocol by an old map in the land office, and by an entry on an old Spanish list of grants, and was early recognized by a tracing on the official maps. (See Record, pp. 83, 84.)

The protocol and testimonio are equivalent to the two parts of an indenture, and proof of either proves the grant.

Fifth and Sixth Exceptions.

(Rec., pp. 71–4 & 74–5.)

The plaintiffs offered the testimonio of a deed from Aguilera to A. M. Massieu, March 10, 1836, with certificates upon which it had been recorded, and the testimony of a witness who had seen the protocol or original, in the office of a notary in Mexico, but could not obtain it. That he knew the handwriting of all the parties who had signed it, and their signatures were genuine; that the testimonio was a true copy. Objection was made in the fifth exception, to the informality of the certification for record, and in the sixth exception, to the failure to account for the witnesses who were present at its execution, (but did not attest the testimonio), and that the non-production of the original was not sufficiently accounted for.

The witnesses were not subscribing witnesses, and after the lapse of thirty-eight years, are conclusively presumed to be dead.

The proof was competent to go to the jury, on common law principles, as the copy of a deed known to be beyond the power of the plaintiff to produce; and also, as a copy of a record of a public office, which private parties are not permitted to remove. 1 Gr. Ev., secs. 485, 508.

Seventh Exception.

(Rec., p. 75.)

The defendant objected that the deed from Aguilera to Massieu, was made while war was flagrant between Mexico and Texas. The deed not being made between enemies is valid. Conrad *vs.* Waples, 96 U. S., 279, 287; *vid.*, also, Sulivan *vs.* Dimmitt, 35 Texas, 114; Munroe *vs.* Searcy, 20 Texas, 348.

Eighth Exception.

(Rec., p. 75.)

The defendant objected to the introduction of a copy of

the deed from Aguilera to Massieu, which had been obtained from one Landgrave, then in charge of the notary's office, where the original was, and attempted to be proved by affidavits before the United States consul. The objection was to these affidavits, and may be well founded, but Mexia had testified as stated in the sixth exception, (Rec., p. 74), that he had examined the copy, and that it was a true copy. This was properly suffered to go to the jury.

The defendant also objected to the said deed and translation, because, "they were not filed with three days, or within one day before the trial." This objection, if sustained by the facts, would merely destroy the effect of the registry as evidence of their execution. But there is no statement in the exception of the time when they were filed, nor is any evidence upon that subject, or absence of evidence, stated in the exception. The fact is only assumed in the objection. The exception, therefore, is fatally defective on this point. The court may have been satisfied that they were filed in time, at any rate the exception does not state that they were not filed in time.

Ninth Exception.

(Rec., p. 78.)

The defendant in proving his title to 1855 acres, offered a deed to himself from one Dunn, dated November 3, 1869. The plaintiff objected because the revenue stamps were not cancelled. The court sustained the objection; whether rightfully or not, will be considered under the next exception. Here, it is enough to say, that the defendant had already proved the title to an undivided half of the land to be in him, and the court instructed the jury that this, for the purpose of the defence, put the defendant, in all respects, in as good a plight as if he had proved the whole title to be in him by the deed which was excluded. So the defendant was not injured by the ruling.

Tenth Exception.

(Rec. p. 79.)

The defendant to prove title in himself to the remaining 153 acres, offered a deed to himself from one Kimbro, dated February 1, 1869, which was objected to by the plaintiff, because the United States revenue stamps had not been cancelled. The objection was sustained.

The revenue act of June 30, 1864, sections 151, 152 and 158, provided that no deed, unless properly stamped, should be recorded or admitted in evidence. By an act of 1866, ch. 184, sections 152 and 158, of 1864, are repealed, and re-enacted with the addition that the stamps must be cancelled in the manner required by law, and provides a mode in which deeds not stamped as prescribed by law, may be so stamped upon payment of certain costs and penalties. The court, in refusing to admit this deed with an uncancelled stamp, simply obeyed the positive requirements of the statute. See 13 Statutes, 292, 293; 14 Statutes, 141, 142.

The cases cited by the counsel (P. E.) go to show that the deed was *not void*. The court below did not hold that the deed was void. The court only held that until the stamps were cancelled in the manner prescribed by law the deed could not be read in evidence.

Eleventh Exception.

(Rec., p. 79.)

The defendant offered evidence that the protocol, or original grant, was not deposited in the Land Office till the year 1873, and then by Mr. Mexia, and moved to exclude it. On cross-examination, the defendants' witness proved that the handwriting of Alderete to the grant, was similar to numerous signatures of the same officer, recognized as genuine in the Land Office. This was sufficient evidence of the genuineness of the grant. Pasch. Dig.,

art. 1.254, note 80; 9 Texas, 372; 1 Gr. Ev., 578. There is no statute of Texas, prescribing how, or when, or whence the Land Office shall obtain its archives. Whether an archive or not, depends on the character of the document. This court said, in Hanrick *qs.* Barton, 16 Wall., 166, that the documents which made up the original title papers to any tract of land belonging to the republic, belonged to the public archives, and under the act of 1836, the Land Office was entitled to the custody of them in whosoever possession they might be.

It is alleged in the brief (P. E.) that the design in placing the protocol in the land office and taking out a copy under the statute, was a device to avoid the necessity of proving it at common law. This is mere suspicion, and if true, would not affect the case. If a device, was it a lawful device? It is obvious that the Commissioner of the Land Office is not obliged, under the statute of Texas, to receive, file, and give copies of any paper which any one may think proper to file with him. He must examine and decide upon its genuineness, for he is to receive only genuine archives. The law imposes this duty upon him and makes his certificate *prima facie* evidence of the grant. The evidence upon which the Commissioner received the protocol could have been produced before the jury, and indeed was produced, but plainly he was better qualified to judge in the first instance whether the paper was genuine than the jury, and if any imposition had been intended he would have been most apt to detect it.

Twelfth Exception.

(Rec., p. 80.)

The defendant again offered the deed from Kimbro to himself, offering to prove its execution by a competent witness, and to cancel the stamps in open court. The plaintiff objected, and the offer was refused. The grounds of the refusal are stated under the tenth exception.

Fourteenth Exception.

(Record, p. 81.)

The point made in this exception by a prayer for an instruction is precisely the same that was made in the seventh exception by a motion to exclude evidence. It has been considered under that head.

Fifteenth Exception.

(Record, p. 81–2.)

This exception is to the refusal of the court to charge that, under the state of facts supposed in the prayer, the defendant was a *bona fide* purchaser without notice, and that therefore the plaintiff could not recover. The court refused so to charge, because the instruction asked was rendered inappropriate by other instructions which the court gave. These instructions will be found in the charge of the court. (Rec., p. 24–27.) The court charges that as both parties claimed under Mexican grants, the title of the plaintiffs was not postponed to the title of the defendant by reason of the neglect of the plaintiff to register his title, even though the defendant had purchased in good faith.

Unless there is some statute of Texas which renders the unregistered title of the plaintiff void as to the defendant, it is obvious that the older title must prevail. No such statute is known to exist. An act of 1836 required all persons to record and prove their titles within fifteen months, and declared by the fortieth section that no deed should take effect as regards the interests and rights of third parties until it should be so proven and presented for record. An Act of May 10, 1838, repealed the limitation of time.

On the 5th of February, 1840, a general registry act was passed, with the usual provision making deeds not registered in time void as to subsequent purchasers with-

out notice, but it is prospective, and applies only to deeds thereafter made. An Act of 1866 declares that titles deposited in the Land Office after location and survey of any land, by virtue of valid land warrants or certificates, shall not be received as evidence of superior title (*i. e.* as against title from the State) unless, &c.

No decision in Texas Courts, I am assured, can be found which holds that, under the Act of 1836, a junior title acquires by priority of registry, priority over an older title, where both emanate from Mexico. Such junior titles are only protected when they emanate from the State of Texas. Where an occupant has no title except what is derived from Mexico, he must depend for his protection upon the statutes of limitation, and upon those provisions of law which secure to him payment for his improvements. It will be seen from the record that both the court and jury gave him an ample measure of such protection.

But, in fact, this exception was defective, because it asked the Court to rule out and exclude from the jury the sketch of 1847, the map of 1855, and the abstract of 1830, as evidence of notice to the defendant, solely upon the ground that no grant of the lands therein indicated was in the Land Office. In Watkins *vs.* Edwards, 23 Texas, 447, it was held that one claiming to be a purchaser without notice, must prove that he paid the purchase money, by evidence outside of the deed.

Sixteenth Exception.

(Record, p. 86.)

The defendant asked the Court to charge that if the right of one of the plaintiffs was barred none of them could recover. The instruction was refused, and properly, 1 Seln., N. P., 769; Adams on Ejectment, 211; Emmons *vs.* Oldham, 12 Texas, 18; Andrews *vs.* Pellus, *Id.*, 108. Moreover, as the jury found that none were barred, the refusal, right or wrong, did not injure the defendant.

Seventeenth Exception.

(Record, p. 87.)

The question in this exception is the same as in the fifteenth, and is there discussed.

Eighteenth Exception.

(Record, p. 87.)

The question in this exception is the same that has been discussed in the thirteenth exception. That the defence of alienage could not be set up by any one but the State, was held in the cases there cited, and particularly in the case of Jones *vs.* McMasters, 20 Howard.

Nineteenth Exception.

(Record, p. 88.)

The question made in this exception is the same made in the fifteenth and seventeenth exceptions, and is discussed in the former.

Conclusion.

I submit that the judgment should be affirmed.

JOHN D. McPHERSON,
Att'y for Deft. in Error.

Decr 70. 78. Rec'd N. H. Swayne.
8 Otto. p. 491
Oct. 2. 1878

Supreme Court of the United States.

OCTOBER TERM, 1878.

AIRHART, PLAINTIFF IN ERROR,
vs.
MASSIEU ET AL. } No. 61.

ADDENDUM TO BRIEF FOR PLAINTIFF IN ERROR.

SECOND AND THIRTEENTH EXCEPTIONS.

Authorities.

Sabriego *vs.* White, 30 Texas, 577, A. D. 1868.

OPINION.—* * * "The facts upon which the plaintiffs base their claim are substantially about these: A concession was made by the executive of the State of Coahuila and Texas to Gertrudis Barrera for three leagues of land in sale under the the 13th article of the colonization law of said State, on the 28th day of April, 1832, and one league gratis, which was conceded in consideration of a previous settlement thereon, and of a ranch at the place when conceded by Francisco Garcia, the husband of Gertrudis Barrera. * * * Francisco Garcia died in the year 1834, at Goliad, where he and his wife then resided. After the death of F. Garcia, and after the commencement of the Texas revolution, but before the declaration of its independence, the mother Gertrudis Barrera, the daughter Pilar, and the son-in-law Manuel Sabriego, moved to Matamoras in Mexico, where the mother, G. Barrera, died in 1842, and the daughter and son-in-law have continued

to reside in Mexico ever since their removal from Texas with the mother." Pp. 578–9.

[Recites proceedings and judgment for plaintiffs for one half of the land—the father's half—writ of error by plaintiffs.]

"The reasons assigned by the plaintiffs in error for a new trial and which are the assignments of error in this court are: That the court below erred in instructing the jury that if they believed from the evidence that Gertrudis Barrera, the mother and ancestress of the plaintiff Pilar, and the said Pilar were citizens of Mexico, and that the mother died more than nine years before the commencement of this action, being an alien and citizen of Mexico, the plaintiffs could not recover more than one half.

"In the consideration of this case upon the facts presented by the record, important questions arise and demand our examination. What was the effect of the revolution of Texas in 1836, and its separation from the parent government upon the vested rights of its then citizens in the lands theretofore granted to them by the parent government? Did the political power which succeeded in establishing its independence of the supreme authority of Mexico adopt such measures as worked a forfeiture of the vested rights of its former citizens who adhered to the mother country? And are such citizens now barred, under any and all possible states of case, from the assertion of their claim to lands in our courts, so granted to them by the Mexican government before the revolution? These are grave and important inquiries, and involve matters of considerable moment to a class of claimants who acquired their rights in good faith, and which, therefore, appeal as strongly to the sense of justice of the judicial tribunals of the country as if they were citizens under the political jurisdiction of our own government. Their rights were acquired in the same manner as the rights of our own citi-

zens, which were acquired anterior to the revolution, and, in the sense of public justice, ought to be equally as sacred. In the revolution and the separation of Texas from Mexico it was the division of an empire, and, under the conviction of that sense of public justice, all publicists and writers upon international law have maintained that the division of an empire works no forfeiture of the rights of property previously acquired. This principle of public law is justly recognized both by our own and the Supreme Court of the United States. If the plaintiffs in error, therefore, had such vested title in the land sued for, paramount and superior to that of the defendant in error, as an act of public justice that right or title ought to be protected, unless it be positively repugnant to and inconsistent with the new political organism of the dismembered portion of that empire.

"After as full an investigation as we have been able to make of the political actions of Texas, as a republic and as a State of the United States of America, we have not been able to discover a single principle in her organization or in her legislative enactments which is repugnant to or inconsistent with the claim of the plaintiffs in error, or which divests the right conferred by the parent government."

The court then considers the effect of article 19 of the plan of provisional government and section 8 of the constitution, respecting the forfeiture of lands by persons leaving Texas "to avoid participation in its present struggle," and holds that Madame Barrera had not forfeited her land by leaving Texas; and proceeds:

"If, then, the title was complete in Madame Barrera in 1842, at the time of her death, whither did the title go when she died? If she had no heirs at law, or if there was no one who could take by succession, the common law having been adopted in the year 1840, the Republic would

have become the inheritor of the estate, and would have taken it as an escheat. But, in order that the government may complete its title by escheat where there are no heirs, the government must do some act of its own to manifest publicly such claim or title; for it is the act of the government, coupled with the operation of law, that constitutes this title by escheat."

* * *

"The statute of descents of the Republic of Texas, in force at the death of Madame Barrera, and not repealed until March the 18th, 1848, provided, that, in making title by descent, 'it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien, and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the Republic and take possession of such land, or shall have nine years to sell the same, before it shall be declared to be forfeited, or before it shall escheat to the government.' [Pasehal's Dig., Art. 44, Note 238.] This provision of the law shows, beyond all controversy, that the common-law rule, that an alien cannot cast the descent upon an alien, was wholly inapplicable to the Republic of Texas. Hence, we conceive that the decision in 18 Howard's Reports, p. 235, was pronounced under a total misapprehension of the state of the law in Texas at the time the rights of the plaintiff accrued. At the death of Madame Barrera, in 1842, her daughter Pilar had nine years within which to assert her possessory claim to the inheritance of the use, occupation, and enjoyment of the land in controversy; in other words, to claim the *plenum dominium* over the property, which was only suspended during the life of the mother. Within that nine years a new form of government intervened, and the nationality of the Republic of Texas was merged in the nationlity of the United States Government, and a new State constitution

was adopted, and we must look to that instrument and the laws passed thereunder to ascertain whether any measures were adopted by this new political power which worked a forfeiture of the rights of the plaintiff, Pilar.

"If our reasonings and conclusions are right in reference to the condition of the parties and the state of the law before the annexation of Texas to the United States Government, then this case may safely be rested upon the decision of Justice Nelson, of the Supreme Court of the United States, in the case of Jones *et el. vs.* McMasters, 20 Howard's Reports, p. 17, in which are clearly presented the methods adopted by the new political organization for the protection of rights previously acquired under antecedent sovereignties of the same territory.

"In that decision it is unequivocally assumed, that the division of an empire works no forfeiture of a right previously acquired, and that the 'right exists in full effect, unless the new severeignity created, within which the lands are situated, have taken some step to abrogate it. The title remains after the revolution and erection of the new government the same as before.' The learned judge then quotes the 10th section of the constitution of the Republic, prohibiting aliens from holding land in Texas except by title emanating directly from the government of the Republic; and then quotes the 20th section of the VIIth article of the present constitution of the State, providing that 'the rights of property and of action, which have been acquired under the constitution and laws of the Republic of Texas, shall not be divested,' &c.; and also the 4th section of the XIIIth article, providing that 'all fines, penalties, forfeitures, and escheats which have accrued to the Republic of Texas, under the constitution and laws, shall accrue to the State of Texas; and the legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated.'

"No such law has been passed by the legislature of

Texas to give effect to escheats for alienage, consequently no defense can be set up against the claim of an alien upon the mere ground of alienage. The plaintiffs, therefore, in this case, are, in our judgment, entiled to their action for the recovery of the land in controversy."

Settegast *vs.* Schrimpf, 35 Tex., 323, A. D., 1871-2.

OPINION.—"The appellants brought suit in the district court to obtain title and possession of thirty acres of land lying near the city of Houston.

"They aver in their petition that their father, William M. Settegast, purchased the land in controversy from John W. Schrimpf, in his lifetime. W. M. Settegast, the father of the plaintiffs, died in 1853. Their mother had previously died, and a second mother and two sisters died about the same time their father deceased. At the death of their father they were infants of a tender age; that Schrimpf took them to his house, where they remained and grew up to manhood; that Schrimpf afterwards dying, the appellee administered upon the estate, and that she fraudulently withholds from them the title to the lands so purchased by their father from her intestate. They further aver that their father took possession of the land after his purchase, made valuable improvements upon it, and dying, was buried on it."

Plaintiffs' amended petition states that their father was domiciled in Texas and had declared his intention to become a citizen. The amended petition was demurred to and demurrer sustained.

The court then considers the case of Yates *vs.* Iams, 10 Texas, 168, and mentions Barrett *vs.* Kelly, 31 Texas, and proceeds:

"But we think this case is in conflict with the case of Sabriego *vs.* White, 30 Texas, 576, and also with the case of Osterman *vs.* Baldwin, 6 Wallace, 106. In this case

the court say: 'A citizen of the United States, and who as such, was, of course, before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became, on the admission, competent, no office having been previously found.' Mr. Justice Lindsay, in his able opinion delivered in the case of Sabriego *vs.* White, holds that Article 44, Paschal's Digest, clearly contemplates an inquest of office before the declaration of forfeiture could be made. In the same opinion, commenting upon Article 44, Note 238, Paschal's Digest, the learned judge says:

'This provision of the law shows, beyond all controversy, that the common law rule that an alien cannot cast the descent upon an alien, was wholly inapplicable to the Republic of Texas. Hence we can see that the decision in 18 Howard's Reports was announced under a total misapprehension of the state of the law in Texas at the time the rights of the plaintiffs accrued.'"

The court then considers the status of Settegast in regard to the domicile and declaration of intention as illustrated by the Koszta case, and proceeds:

"Under this authority of the United States, we are forced to the conclusion that he must be regarded as having secured to himself and his children, who were minors, under the age of seventeen, the right of a naturalized citizen, except so far as pertained to the exercise of the elective franchise.

"But, without intending to place our decision solely upon this ground, we hold that, under the act of the twenty-eighth of January, 1840, and the substantial re-enactment of the same on the eighth of March, 1848, all difficulty in the way of the title to land in William M. Settegast, descending upon his death to his children, had been removed. It is true the language of the act might be more plain. The act reads thus: 'In making title to land by descent,

it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or has been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the Republic and take possession of said land; or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the Government.' This, as Mr. Justice Lindsay has said, indubitably shows that the common law rule that an alien cannot cast descent upon an alien, was totally inapplicable to the State of Texas.

Hammekin *vs.* Clayton, 2 Woods, 336, A. D. 1874.

Action of trespass to try title. Plaintiff claimed under a grant from State of Texas and Coahuila to Manuel Rejon, November 8, 1833, who, by deed of April 11, 1836, conveyed to Mrs. Laguerenne, a Mexican, who never resided out of Mexico. The purchase by Mrs. L. was in trust for Hammekin, a citizen of the United States, and an alien in Mexico.

The court, Judge Duvall, instructed the jury that the deed to Mrs. Laguerenne was void; on motion for new trial for misdirection, Judges Woods and Duvall concurred in granting a new trial.

Opinion by Judge Woods:—"The defendant insists that the instruction was correct and that the deed was void upon two grounds:

"1st. Because it was made with the purpose to evade the laws of the State of which Mrs. Laguerenne was a citizen and where the plaintiff was domiciled, and,

"2d. Because at the date of the deed the Republic of Texas within which the land was situated, had declared its independence and adopted a constitution, and both the constitution and laws of Texas forbid that an alien should hold land except by titles emanating directly from the government of the republic.

* * *

"The main question in the case is the second, viz.: Was the deed in question by the constitution and laws of the Republic of Texas absolutely void so as to convey no title to Hammekin?

"Between the 17th of March, 1836, and the 20th of January, 1840, the laws of Mexico, unless where modified by the constitution and statutes of the Republic of Texas were in force in Texas. [Authorities.]

"It becomes, therefore, important to determine whether by the Mexican law the deed of Rejon was void and conveyed no title. Upon this point the decided weight of authority is, in our opinion, with the negative of this proposition." Citing: Eschriche, vol. 2, 696; Sala Mex., vol. 2, 240; Ramires *vs.* Kent, 2 Cal., 558; The People *vs.* Folsom, 5 Cal, 378; Merle *vs.* Mathews, 26 Cal., 478; Racouillat *vs.* Sauserain, 32 Cal., 386; Osterman *vs.* Baldwin, 6 Wall., 121.

"But it is insisted that the Supreme Court of Texas has settled the law otherwise, and that this court should follow the courts of Texas, which have established the contrary doctrine as a rule of property in the State.

"We are cited to the cases of Holliman *vs.* Peebles, 1 Tex., 673; Yates *vs.* Iams, 10 id., 168; Clay *vs.* Clay, 26 id., 24; La Coste *vs.* Odam, 26 id., 458, and other cases, to show that the ruling of the Supreme Court of the State has been, that a deed of lands to an alien, under the laws of the Republic of Mexico, was absolutely void, and conveyed no title.

"We should feel bound to follow these decisions of the Supreme Court of Texas, had they not been unsettled by later adjudications.

"The case of Barrett *vs.* Kelly, 31 Tex., 476, is subsequent in date to all the cases cited to show the invalidity of the deed of Rejon, and is entirely inconsistent with those cases; nd, though not in words, yet in effect, it overrules them

* * *

"In the case of Settegast *vs.* Schrimpf, 35 Tex., 341, the Supreme Court of the State appear to cite with approbation the case of Osterman *vs.* Baldwin, 6 Wall., *supra.*

"We are of opinion, therefore, that the later and better view of the Supreme Court of this State is, that under the Mexican law, a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by the Government for that purpose.

"Our conclusion is, therefore, that a new trial should be granted on account of the error of the court in instructing the jury that the deed from Rejon to Mrs. Laguerenne was void and conveyed no title."

Schrimpf *vs.* Settegast, 38 Texas, 96. A. D. 1873.

Same case on second trial; argued elaborately for appelant.

OPINION.—"The reconsideration of this case has not changed our former opinion upon the main question involved. We do not now propose to deliver an opinion to take the place of that formerly delivered touching the rights of the appellees. * * * It is our opinion that, on the death of their father, they took an estate of inheritance in the land." Pp. 108, 109.

Samuel Andrews *vs.* Heirs of John Spear. 48 Texas, 567, A. D. 1878.

Appeal from DeWitt county.

Gould, J., delivered the opinion of the court:

The questions mainly discussed by counsel for appellant grow out of the alleged alienage of John Spear at the time (1841) when the land in controversy was conveyed to him, and at the time of his death in 1852.

The constitution of the republic says: "No alien shall hold lands in Texas, except by title emanating directly from the government of this republic." General Provisions, sec. 10, P. D., p. 37. We are aware of no decision

to the effect that, under this constitutional provision, a conveyance of land to an alien was a nullity. On the contrary, it has been held that such a conveyance was only voidable, and was valid to protect the alien in the enjoyment of the land until some proceeding on the part of the republic against him. 6 Wall., Osterman *vs.* Baldwin.

So, whilst the rule of the common law was that an alien could not cast descent, and that, on the death of the alien, his lands would, without inquest or office found, escheat and vest in the State, and there have been decisions of this court from which it might be inferred that, prior to the act of 1854 (P. D., art. 45, *et seg.*), this rule still prevails in Texas, we are aware of no decision under the 14th section of the statute of 1840, re-enacted in the 9th section of the act of 1848, regulating descents, in which this harsh rule was actually enforced, and the claim of the heirs denied because the ancestor was an alien. (Barclay *vs.* Cameron, 25 Tex., 243; White *vs.* Sabriego, 23 Tex., 244; Warnell *vs.* Frinch, 15 Tex, 169.) The section referred to is as follows: "In making title to land by descent it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien; and every alien, to whom any land may be devised or may descend, shall have nine years to become a citizen of the republic, and take possession of such land; or shall have nine years to sell, before it shall be declared to be forfeited, or before it shall escheat to the government." P. D., art. 44. It has been decided by this court in a case where the alien died in 1853, whilst this statute was in force unmodified, prior to the act of 1854 defining the civil rights of aliens, a case in which that question was distinctly presented, argued and considered, that the common law rule that an alien cannot cast descent did not prevail in Texas. Settegast *vs.* Schrimpf, 35 Tex., 323; see, also, Sabriego *vs.* White, 30 Tex., 576.

The question having been there decided, we are aware

of no sufficient reason for reopening the subject for the purpose of inquiring into the correctness of that decision. It may be that we would not, if it were an original question, be able to concur in that construction of the statute. If so, it certainly would have been with regret that we enforced a rule so harsh, where the heirs of the alien were, or had become cititzens of the United States. The course of events has long since removed all disabilities of alienage as to citizens of the United States, and has also led to the enactment of a statute which expressly authorizes an alien to "take and hold any property, real or personal, in this State, by devise or descent, from any alien or citizens, in the same manner in which citizens of the United States may take and hold real and personal estate by devise or descent within the country of such alien." P. D., Art. 46. It certainly is not now the policy of our State to absolutely prohibit an alien from holding lands or from transmitting them on his death. Under these circumstances we are satisfied to follow the decision in Settegost *vs.* Schrimpf, and hold that, in 1852, the lands of an alien did not, upon his death, escheat to the State, but descended to his heirs, subject to escheat, however, on proceedings instituted by the State if those heirs were aliens and failed to comply with the terms of the statute. The answer setting up the alienage of John Spear constituted no defense; the court did not err in excluding evidence in its support.

FOURTH EXCEPTION.

Whether, if the testimonio was not duly recorded, it could be admitted in evidence.

[REMARKS.—The *only* objection was that the testimonio was not properly recorded. It would seem unnecessary to say more than that if not properly recorded, or if not recorded at all, it was properly admitted, as this court said in McPhaal *vs.* Lapsley—"In this case the plaintiff offered the testimonio in evidence, and it was properly received

It would have been admissible without recording." Citing Martin *vs.* Parker and McKissash *vs.* Colquhoun.]

Other Authorities.

Martin *vs.* Parker, 23 Texas, 253, A. D. 1862.

STATEMENT.—" Action of trespass to try title." * * * " The original concession to Manchaca was dated the 19th of May, 1830.

" On the 1st of September, 1830, Manchaca executed a power of attorney to Allen Reynolds, empowering him to apply for and receive the final title and possession of the land granted, and on the succeeding day, September 2d, 1830, Manchaca executed to Reynolds an act of sale of the land. Both of these instruments were executed before the alcalde of San Felipo, and were signed by him and two assisting witnesses, but were not signed by the instrumental witnesses." Statement, p. 255.

OPINION.—" It is further objected to the act of sale of the 2d of September, 1830, that it was not an authentic act, and *was, therefore, inadmissible, without proof of its execution.* We do not think the objection well taken. In McKissach *vs.* Colquhoun (18 Tex., R. 151,) Chief Justice Hemphill said: ' The signature of a judge or alcalde, acting in the place of a notary, authenticated by two subscribing witnesses, has all the force and effect of the signature and seal or rubric of a notary.' " Opinion, p. 260.

McKissach *vs.* Colquhoun, 18 Texas, 149.

OPINION. The first assignment is that the court erred in admitting in evidence the deed from Sarah Hensley to Wm. H. Steele, because the same was not proven or authenticated according to law. The deed was executed before J. G. W. Pierson, as second judge of the first instance, and was signed by the vendor, Sarah Hensley, by Pierson, as judge, and by two instrumental and two assisting witnesses. The protocol, and not the testimonio, ap-

pears to have been given to the vendee, to serve him as evidence of his title. It was admitted that Pierson acted as judge in 1835, and this raises at least presumption of his authority. The signature of a judge, alcalde, &c., acting in the place of a notary, authenticated by two assisting witnesses, has all the force and effect of the signature and seal or rubric of a notary, consequently the deed was one which would have been recognized under the laws at the time it was executed as a public instrument, which required no proof of its execution when offered in evidence."

In this case the judge appeared before the clerk and "acknowledged his own signature, and also proved the signature of signer, Sarah Hensley," and upon this evidence alone, the deed was admitted to record. *Held* duly recorded under the act of 1836, sections 35–38.

Smith *vs.* Townsend, Dallam, 569.

OPINION.—"During the progress of the trial an instrument was introduced, purporting to be a copy of a public act of sale from one Jesse C. Tannehill to the plaintiff, which was objected to, and a bill of exceptions is filed, &c. The competency of the instrument as evidence is excepted to on the grounds—

"1. The instrument was not the original deed from Tannehill to the plaintiff.

"2. If it were the same, it is not sufficiently authenticated.

"The instrument to the introduction of which exception was taken, has been sent up to this court for inspections, and purports to be a copy of a public act of sale executed on April 25, 1835, in the town of Mina, before Thomas J. Gazely, judge of the first instance of the jurisdiction of Mina. It is certified to be a true copy of the original (with the addition of the plot), which remained in the office under charge of the judge. The certificate was dated on the

day after the execution of the original, and was signed by the judge, with two assisting witnesses." * * *

"No objection was taken to the act as not having been before a notary public, and any examination of the powers of a judge of first instance to authenticate public instruments is therefore rendered unnecessary. It was treated as a notarial act and will be considered as such.

"Is then a copy of a notarial act admissible in evidence without the production of the original? And if so, does the production of the instrument cause full proof of its contents without evidence of the authority or signature of the notary and assisting witness?" P. 570.

[After discussing the questions at large, the opinion concludes] "The law and facts of this case being considered, we are of the opinion that the court below did not err in admitting the instrument excepted to." P. 573.

White *vs.* Holliday, 20 Tex., 679, 682.

The subscribing witnesses not having been called or accounted for, when the grantor having no interest proves a deed executed by himself, the assisting witnesses need not be called or accounted for.

Titus *vs.* Kimbro, 8 Texas, 210.

OPINION.—"The commissioner issuing title is required to observe nothing more than the customary forms in the execution of public instruments. He must write the original draft in his book, and give a certified copy or testimonio to the interested party, to serve him as evidence of title, just in the same way and to the same extent that a testimonio or copy of any and all public instruments executed before a notary, serves the parties thereto as evidence of their rights.

"A testimonio or copy of a title for land, executed by a commissioner, furnishes as high evidence of right as does a testimonio or first copy of any act executed before a notary public, but not more high or more conclu-

sive. They are one and all alike—cause faith or full proof, but the force and effect of each and every testimonio of any act executed by any public officer, whether he be a Commissioner or notary public, may be impaired and destroyed upon grounds applicable alike to testimonios or second originals." P. 219.

NINTH, TENTH AND TWELFTH EXCEPTIONS.

[REMARK.—The sections of the act of Congress are not numbered correctly in the brief; below is the text.]

Authorities.

Act of June 30, 1864, chapter 173. 13 Statutes, p. 292, sec. 150. "And be it further enacted, that * * * on and after the 1st day of August, 1864, there shall be levied and collected, and paid, for and in respect of the several instruments, matters, and things mentioned and described in the schedule (marked B) hereunto annexed, or for or in respect of the vellum parchment or paper upon which such instrument, matter, or things, or any of them shall be written or printed, by any person or persons or party, who shall be made, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several duties or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule."

P. 292, sec. 152, "That it shall not be lawful to record any instrument, document or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed; and the record of such instrument upon which the proper stamp or stamps aforesaid shall not have been affixed, shall be utterly void and shall not be used in evidence."

P. 293, sec. 156, "That in any and all cases where an adhesive stamp shall be used for denoting any duty imposed by this act, except as hereinafter provided, the person us-

ing or affixing the same shall write thereupon the initials of his name, and the date upon which the same shall be attached or used, so that the same may not again be used."

P. 295, sec. 163. "That no deed, instrument, document, writing or paper, required by law to be stamped, which has been heretofore signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof shall be recorded, or admitted or used as evidence in any court, until a legal stamp or stamps, denoting the amount of duty, shall have been affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon by the person using or affixing the same; and the person desiring to use or record any such deed, instrument or document, writing or paper, as evidence, his agent or attorney is authorized to, in the presence of the court register or recorder, respectively, to affix the stamp or stamps thereon required."

Act of July 13, 1866, chap. 184, amending the act of June 30, 1864, &c. 14 Statutes, p. 141. "That section one hundred and fifty-two be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That it shall not be lawful to record any record instrument or paper, required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed and canceled in a manner required by law; and the record of any such instrument, upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid, shall be utterly void, and shall not be used in evidence."

P. 143. "That section one hundred and sixty-three be amended by striking out all after the enacting clause, and inserting in lieu thereof the following: 'That hereafter no deed, instrument, document, writing or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or

used as evidence in any courts, until the legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law.'"

[NOTE.—The words "duly stamped," must mean stamped according to section 151, and the stamp cancelled according to section 156. The mode of stamping deeds not stamped when issued, prescribed in same act, pp. 142–3, is to be by a collector, on payment of penalty or on proper explanations.]

ELEVENTH EXCEPTION.

Authorities.

Act of 14th December, 1837. P. D. Art 71.

"The Commissioner of the General Land Office be entitled to, and shall keep charge of the seal, and also that he be, and is hereby entitled to, and shall have custody and control of *all books, records, papers and original documents appertaining to the titles of lands*, heretofore and by the provisions of the law denominated archives, and that the said books, records, papers and original documents, shall become and be deemed the books and papers of said of office."

"The titles anterior to the revolution emanated either in whole or in part, either primarily or in their structure, from a government now foreign. * * * The archives are beyond the jurisdiction of the State, and to a great degree inaccessible." Edwards *vs.* James, 7 Tex., cited in P. D., Note 251 to Art. 71.

[Here the originals while in Mexico are called "archives."]

"There are but few original protocols or matrices of titles in Texas." P. D., Note 251.

Paschal *vs.* Perez, 7 Tex., 348.

"A paper, then, to be entitled to admission into the General Land Office, must have constitued an archive or record of some former office. It is immaterial in whose

possession the paper may have been before its deposit, whether in that of an empressario, political chief, alcalde, commissary, or commissioner for issuing land titles, or any other person (Art. 1786), provided it shall have been an archive, or an original document or register in some office, and appertain to the lands of the Republic."

[Remark.—The brief for P. E. seems to deny that Del Vallee's list, on which the grant is found, is an archive. In the case about to be cited, the list was referred to by counsel as a document of such authority that a grant not mentioned therein was open to suspicion; the court replied in a way which admits the authority and authenticity of the list.]

McGehee *vs.* Dwyer, 22 Texas, 435.

Opinion.—"It is supposed to cast suspicion on the concession that it is not found upon the list furnished by the secretary, Del Vallee, as certified from the General Land Office. But this does not purport to be a list of all the concessions or titles which had been made by the Government, but only of those, 'the original documents of which are on file in these archives,' of which copies had been furnished to the party. Why the original of the concession was not on file in these archives, and consequently not included in the list, is fully explained by the evidence." Pp. 461–2.

Fifteenth Exception.

Authorities.

It is said in Paschall's Digest, in note 1092 to article 4983, as the result of numerous authorities, that to sustain the defence of innocent purchaser without notice, the defendant must prove payment of purchase money by evidence aliunde the recitals of the deed. This is expressly held in Watkins *vs.* Edwards, 25 Texas, 447. Said the court: "To entitle a subsequent vendee to have a prior unregistered conveyance postponed to his subsequent con-